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Supreme Court of the United States

OCTOBER TERM, 1963

No. 199

WINSTON MASSIAH, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 186—September Term, 1961.

Argued February 8, 1962

* * * *

Docket No. 27125

UNITED STATES OF AMERICA, APPELLEE

v.

WINSTON MASSIAH, MITCHELL ANFIELD, LEONARD ROYAL AIKEN, and ICKY THORN, APPELLANTS

Before:

LUMBARD, *Chief Judge*,
WATERMAN and HAYS, *Circuit Judges*.

Appeals from convictions for conspiracy to import drugs into the United States in violation of 21 U. S. C. §§ 173 and 174 after trial in the Southern District of New York before J. Skelly Wright, *J.*, sitting by designation, and a jury. Massiah also appeals from conviction for related offenses in violation of 21 U. S. C. § 184(a), §§ 173 and 174, and 26 U. S. C. §§ 4701, 4703, 4704(a), 4771(a), and 7237(a).

Reversed as to conspiracy convictions; affirmed as to Massiah's substantive convictions.

[fol. 2] SHELDON H. ELSEN, Assistant United States Attorney, Southern District of New York, New York, N. Y. (Robert M. Morgenthau, United States Attorney, James G. Starkey, David Klingsberg, Peter K. Leisure and Arnold N. Enker, Assistant United States Attorneys, on the brief), *for appellee.*

ROBERT J. CARLUCCIO, New York, N. Y., *for Winston Massiah, appellant.*

LEWIS A. STERN, New York, N. Y., *for Mitchell Anfield, appellant.*

CARSON DEWITT BAKER, New York, N. Y., *for Leonard Royal Aiken, appellant.*

EDWARD CHERNEY, New York, N. Y., *for Leonard Royal Aiken, appellant.*

ICKY THORN, *appellant pro se.*

OPINION—July 27, 1962

LUMBARD, *Chief Judge:*

Winston Massiah, Mitchell Anfield, Leonard Royal Aiken and Icky Thorn appeal from their convictions, after an eleven-day trial before a jury in the District Court for the Southern District of New York, for conspiracy to import cocaine into the United States in violation of 21 U. S. C. §§ 173 and 174. Massiah also appeals from his conviction on three related charges: unlawful possession of cocaine on May 6, 1958 on the S.S. Santa Maria, a United States vessel engaged on a foreign voyage, in violation of 21 U. S. C. § 184(a), unlawful concealment of the same cocaine in violation of 21 U. S. C. §§ 173 and 174, and possession, on the same occasion, of cocaine not having come [fol. 3] from an original stamped package, in violation of 26 U. S. C. §§ 4701, 4703, 4704(a), 4771(a) and 7237 (a).[1]

[1] Massiah was sentenced to nine years' imprisonment on each of the counts against him, the sentences to run concurrently. Anfield and Thorn were each sentenced to nine years' imprisonment on the conspiracy count, and Aiken, a second offender, to thirteen years' imprisonment.

These appeals present two major questions. The first is whether it was proper to receive in evidence testimony by a federal officer concerning conversations of Massiah and Anfield which each held separately with a co-defendant, Jesse Colson, in Colson's automobile. With Colson's cooperation, a portable transmitter had been secreted in the automobile. Both Massiah and Anfield claim that it was unlawful thus to eavesdrop on the conversations, and Massiah further claims that the procedure was illegal because he was already indicted (under an indictment returned prior to that on which he was tried, but which was concerned with the same subject matter) and had retained counsel, and therefore could not legally be approached by persons acting on behalf of the government in the absence of his counsel. The second major question is whether the trial judge inadequately charged concerning the necessity, under 21 U. S. C. §§ 173 and 174, that the conspirators had had knowledge of illegal importation.

Judge Waterman and I are in agreement that the eavesdrop evidence was admissible against both Massiah and Anfield, while Judge Hays considers it inadmissible against Massiah. Thus we affirm Massiah's conviction on the substantive counts, with Judge Hays dissenting. Since Judge Waterman agrees with Judge Hays' view, stated in his separate opinion, that the change on the conspiracy counts was inadequate, the convictions of Anfield, Aiken and Thorn and Massiah's conspiracy conviction are reversed and remanded for a new trial. I dissent from this [fol. 4] disposition of the conspiracy counts for the reasons stated in part II of this opinion and vote to affirm all the convictions.

We briefly summarize the evidence which was given by several participants in the conspiracy and those who dealt with the conspirators.

Massiah, Colson and Anfield were seamen on ships of the Grace Line, and commencing in 1956 they obtained cocaine from one Rene Huasaff in Valparaiso, Chile, took it aboard a Grace Line ship to the United States and caused it to be brought ashore by longshoremen when the ships had docked in the Hudson River at New York. Aiken and Thorn purchased large quantities of the cocaine

from the importer-defendants and distributed it in New York. There was evidence of at least twelve importations and seven purchases between 1956 and 1959.

The importer-defendants would often arrange to have a longshoreman pick up the cocaine on the vessel, take it ashore, and later meet them at an appointed rendezvous. Longshoreman James Barber testified that he had thus assisted Massiah and Colson after their arrival at New York on a number of occasions in 1956. Massiah's landlady, Elita Lloyd, testified that at about this time he had told her he was dealing in "coke." In 1958 Colson arranged to have a fellow seaman, Paul King, bring in "paint solids" which turned out to be cocaine. The appellant Thorn waited with Colson while King went back on the ship and returned with the "paint solids' which Colson then told him were narcotics.

In April 1958 customs agents were informed by Francisco Torres, a seaman who testified that he had bought cocaine from Jesse Colson on several occasions in 1957 and had been offered cocaine by Massiah, that a shipment of cocaine was due to arrive in New York on the S.S. Santa Maria on May 6 or 7. Customs agents boarded the ship when it docked and found in the aft peak five packages [fol. 5] containing over three and one-half pounds of cocaine. In Massiah's locker Agent Cozzi found tape exactly similar to that with which the packages were wrapped and a textile technologist testified that the torn end of the roll found in Massiah's locker matched the end of the tape with which the cocaine had been wrapped.

After Massiah's arrest, Colson telephoned Chile and arranged to have two Chilean women deliver cocaine to his home in the Bronx. There were two shipments and the bulk of both was sold to Aiken. Thorn also purchased some of this cocaine.

I. *Massiah's Conviction on the Substantive Counts—The Eavesdropping Incident*

Three weeks after his arrest on the Santa Maria, Massiah was indicted on May 28, 1958 and charged with violation of 21 U. S. C. § 184(a) for possessing three pounds eight ounces of cocaine on board a United States vessel.

On July 20, 1959, Massiah was again indicted together with Jesse Colson and one Rene Huasaff on a charge of conspiracy to violate the narcotic laws in violation of 21 U. S. C. §§ 174 and 184(a). Colson was thereupon arrested and a few days later he decided to cooperate with the government.

At 9:30 on the evening of November 19, 1959, Massiah got into Colson's Chrysler automobile which was then parked on West 146th Street between Seventh and Eighth Avenues. Prior to Massiah's meeting with Colson, Agent Murphy with Colson's consent had placed under the front seat of Colson's car a Schmidt portable transmitter which enabled him to hear the conversation through earphones while seated in another car.

Judge Wright, overruling numerous objections to the admission of the conversation, limited Agent Murphy's testimony to what Massiah said and excluded Colson's part [fol. 6] in the conversation. The judge also instructed the jury to consider the evidence only as to Massiah. Agent Murphy testified that in the course of the conversation Massiah told Colson that in late April 1958, while at the home of Rene Huasaff, in Valparaiso, Chile, he wrote a letter to New York and stated the amount of cocaine he was bringing in; he had the cocaine in a suitcase in his room aboard ship for twenty-two days and, when he noticed two days out of New York that the cocaine was evaporating he got the roll of tape and attempted to make it airtight to prevent further wastage. He said it was this tape which got him into trouble. Massiah also told Colson that upon arrival he met a longshoreman and motioned him through the passageway to show him where the cocaine was, but then noticed two men following him and told the longshoreman to come back later. Massiah also told Colson that he knew that information had been given the authorities by Frank Torres and also by a woman named May with whom he had had some dealings.

The indictment on which the appellants were tried was filed on March 3, 1961. In addition to Massiah, Colson and Huasaff, it named the appellants Anfield, Thorn and Aiken and seven others, and it listed fourteen co-conspirators. Obviously the Schmidt transmitter evidence was part

of a continuing investigation which bore sufficient fruit to result in the broader charges against many more defendants. As the trial judge permitted the jury to hear only limited parts of this evidence, we canot know in what other ways it may have assisted the government investigation.

Although Colson had pleaded guilty to several counts of the indictment, he did not testify against the other defendants at this trial.[2] The defendants called no witnesses [fol. 7] and none of them took the stand. There was ample evidence to support the convictions of all four appellants.

Massiah's counsel at trial made four objections to Agent Murphy's testimony, but of these he pressed only one on appeal, that use of the hidden device constituted unlawful eavesdropping. To support our rejection of this claim, we need do no more than refer to the discussion of a similar contention in our recent decision in *United States* v. *Kabot*, 295 F. 2d 848, 853-54 (1961), cert. denied, 369 U. S. 803 (1962).

On appeal Massiah raises a contention not made at trial, that since he was already under indictment at the time and represented by counsel it was a denial of his rights for any government representative to procure and listen to his conversation with Colson unless his lawyer was present. We do not agree.

The government had the duty to continue its investigation of the possible criminal activities of those suspected of crime even though they might be under charges or indictment at the time. Massiah acquired no immunity from the government's procuring and use of additional evidence merely by reason of having retained an attorney.[3] In-

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[2] At an earlier trial of these appellants, when Colson took the stand he told the court that he could not testify because his family had been threatened. Counsel for the defendants moved for a mistrial and on the following morning Judge Wright granted the motion for mistrial and commenced a retrial of the defendants on the next day before a new jury. Apparently the government chose not to call Colson as a witness because of his outburst at the first trial.

[3] The record does not show when counsel first appeared for Massiah. But as the government argues on the assumption that Massiah was represented by counsel on November 19, 1959, and that the government knew this, we treat this as being the fact.

deed the public interest would clearly seem to require the continuance of such investigations so that all involved may be prosecuted. Massiah was enlarged on bail. Whatever he said or did, if it constituted an admission of the pending charges, would be relevant and admissible in evidence [fol. 8] against him, provided of course the admission or action was voluntary. If a spontaneous conversation with Colson had been overheard by someone nearby there would be no question of its admissibility. It makes no difference that Colson was acting on the suggestion of Agent Murphy in inducing Massiah to enter the Chrysler and talk about the case. It is not disputed that Massiah entered the car of his own free choice and that he was equally free to speak about the case or to say nothing. It would needlessly hamper investigations of government agents if they were not able to make such contact with those under charges of crime as Agent Murphy made here through the co-defendant Colson. Many criminal cases are solved by such means.

We find no conflict between this view and the ethical precept that forbids direct communication between an attorney and another party represented by counsel, A. B. A. Canons of Ethics, Canon 9. Assuming without deciding that it would be improper for a prosecutor to interview a criminal defendant under indictment in the absence of his retained counsel, see Drinker, Professional Ethics 202 (1953), such a prohibition would not require that government investigatory agencies also refrain from any contact with a criminal defendant not in custody simply because he had retained counsel. To be sure, such a rule would prohibit an investigator's acting as the prosecuting attorney's alter ego, but there is no suggestion that Agent Murphy was so acting here. Moreover, the contact here was at still one further remove—with a co-defendant whose instructions from the investigator were apparently no more than to induce Massiah to talk. This was not a case where a defendant was in danger of being tricked by a lawyer's artfully contrived questions into giving his case away.

No case has been cited to us which supports the rule urged here by appellants. *Spano* v. *New York*, 360 U. S. [fol. 9] 315 (1959) is not in point as the Supreme Court

found that the defendant's confession had been produced by coercion. Spano was under indictment for murder and had been surrendered by his counsel who had instructed him to answer no questions. Despite this, an assistant district attorney and numerous detectives questioned him in prison for eight hours and obtained a confession. The Supreme Court found that Spano's will "was overborne by official pressure, fatigue and sympathy falsely aroused" and that the confession was coerced. Clearly Massiah's talk in Colson's car was not coerced in the slightest degree. There was no reason to believe that he was not speaking freely and without restraint of any kind.

Nor is *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960) in point as there too the defendant was in custody, and without his counsel, during his interrogation by an assistant district attorney after his indictment for a capital offense.

We see no reason why narcotics agents should not secure evidence by such deception as was played on Massiah in this case. Those who are engaged in the difficult and dangerous business of investigating illegal dealings in narcotics should not be deprived of any reasonable means of securing evidence. The Narcotic Control Act of 1956 is striking evidence of Congressional concern over this problem. That Act, 70 Stat. 567, 18 U. S. C. § 1405, 26 U. S. C. § 7607, gave increased powers of search and arrest to government agents investigating violations of the customs and narcotics laws; it gave prosecutors the means of giving immunity and compelling testimony, and it greatly increased the minimum and maximum punishments for violations of these laws. See also House Report No. 2388 and Conference Report No. 2546 accompanying H. R. 11619, 84th Cong. Second Session (1956), 1956 U. S. Code Cong. & Admin. News, 3274-3322.

[fol. 10] Massiah makes other claims of error which require but brief reference, if any.

He complains of the search of the Santa Maria and his locker by the customs agents. 19 U. S. C. §§ 482 and 1581 have long authorized such searches of incoming vessels. We said in *Landau* v. *United States Attorney*, 82 F. 2d 285, 286 (1936): "The search which customs agents are authorized to conduct upon entry is of the broadest pos-

sible character and any evidence received might be used."

The trial judge's action in admitting into evidence on the substantive counts against Massiah the tape found in his locker and the tape wrapped around the cocaine package was entirely proper. It had already been received on the conspiracy count. There is no showing that this ruling at the end of the government's case in any way prejudiced Massiah and no such claim was ever made. After this the defendants immediately rested without calling any witnesses.

II. *The Conspiracy Counts*

Although numerous errors are alleged with respect to the conspiracy convictions, the only important point is the claim that Judge Wright did not make it clear in his charge that it was necessary for the jury to find that the conspirators either had knowledge that the drugs in question had been illegally imported or else had such "possession" of the drugs as would under the terms of § 174 raise the presumption of such knowledge. We hold that the other miscellaneous claims of error are without merit,[4] but

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[4] Aiken complains that the trial judge did not sufficiently explain to the jury the issues with respect to his identity. We do not agree. The indictment named in Count I "John Doe, a/k/a 'Leon,' meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approximately 40 years old, approximately 5' 9" tall and weighing approximately 165 lbs. * * *" One Leon Ellis testified at considerable length regarding the appellant. He identified the appellant Leonard Royal Aiken as the "Leon" for whom he carried packages of cocaine and to whom Jesse Colson sold large quantities of cocaine on numerous occasions. Although Aiken had been arrested as "John Doe, also known as Leon" on a warrant on May 13, 1961, he did not raise the question of his identity before trial. Judge Wright charged the jury that they must first determine whether the defendants on trial were the defendants named in the indictment. There was no error in his refusal to charge that "If the jury finds * * * that the evidence equally points to the possibility that the defendant named as Leon in the indictment might be Leon known as Schoolboy Ellis, or Leonard Royal Aiken, they must acquit." As the judge had also charged that the jury must find each defendant on trial guilty beyond a reasonable doubt this was all that Aiken was entitled to. There had been no confusion in the evidence.

The appellant Aiken also claims error in the admission against

[fol. 11] my brethren feel that the charge was insufficient. Accordingly, the conspiracy convictions are reversed and remanded for the reasons stated in Judge Hays' opinion. The following views are my own in dissent.

None of the appellants took any exception to the charge on the grounds asserted here, and in any event I would [fol. 12] hold that there is no prejudicial error if the charge is read as a whole.

Although the judge erroneously said that the conspiracy was charged under the general federal conspiracy statute, 18 U. S. C. § 371, rather than the conspiracy clause of 21 U. S. C. § 174, the error made no significant difference, since all the relevant elements of a conspiracy to violate §§ 173 and 174 were properly set forth.[5] I cannot believe

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him of testimony by Agent Murphy that after Aiken had been arraigned by Agent Murphy on May 13, 1961, Aiken said to Murphy "If you get any stuff you want to get rid of, call me, you can trust me." It was not error to receive evidence which the jury could consider as an admission by the defendant that he was willing to deal and had been dealing in narcotics. *United States* v. *Picarelli*, 148 F. 2d 997 (2 Cir.), cert. denied, 326 U. S. 722 (1945); 4 Wigmore, Evidence, § 1061(8) (3d ed. 1940). The judge instructed the jury to consider this only as to Aiken, just as he instructed the jury that Massiah's statements to the customs agents on May 6, 1958 were to be limited to Massiah. In these rulings there was no error as to the other defendants on trial.

We find no error in the claim of the appellants that the indictment did not adequately inform them of the charges. No motion was made with respect to the indictment or for any bill of particulars, nor is there any showing as to how any claimed defect may have prejudiced the appellants.

Anfield claims that it was error for the judge to admit into evidence testimony by Agent Murphy as to a conversation he had in Colson's car on December 5, 1959, which Murphy overheard by means of the Schmidt transmitter. We hold that this was proper evidence for the reasons stated in the discussion of Massiah's substantive case.

None of the other errors alleged are sufficiently substantial to require discussion.

[5] The only real difference between conspiracy under 21 U. S. C. §§ 173 and 174 and a conspiracy under 18 U. S. C. § 371 is that the former section carries much heavier penalties and additional penalties for multiple offenders. Thus these are matters affecting sentence only. The indictment which was sent to the jury during its deliberations plainly charged conspiracy in violation of 21 U. S. C. §§ 173 and 174.

that the jury would not have understood the charge with respect to the necessity of knowledge of importation and the presumption following from possession. The judge read the essential language of the first sentence of § 174, as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such narcotic drug after importation, *knowingly the same to have been imported illegally*, or conspires to commit any such action in violation of the laws of the United States, shall be punished." (Emphasis added.)

This language is not difficult for a layman to understand, and, given the evidence in the case, which dealt with an importation conspiracy, it would not have been unreasonable for the jury to conclude that the participants knew the importation to be illegal. And in his explanation of the concept of conspiracy, Judge Wright re-emphasized the need to find that each defendant "knowingly and wilfully participated in the unlawful plan with the intent to ad-
[fol. 13] vance and further some object or purpose of the conspiracy," and had the "specific intent to do some act which the law forbids."

Since it is harder for the government to show knowledge of illegal importation than to show the possession required to raise the presumption, the appellants cannot complain of a failure to charge concerning the presumption. Such failure to charge would, given the language alluded to above, have held the government to a higher rather than a lower standard of proof; the jury would, then, have found actual knowledge. Moreover, I think that from hearing the charge as a whole the jury was aware of the existence of the presumption and its relevance to the conspiracy count. Before Judge Wright charged concerning the conspiracy count, he had given instructions on the various substantive counts against Massiah, one of which charged violation of §§ 173 and 174. On that count, he had read the pertinent parts of the statute to the jury and had given a full explanation of the statutory presumption.

When, no more than a few minutes later, he again read the same language of the statute in his instructions on the conspiracy count, he said, "You will note that the conspiracy charges in count 8 relate also to the same substantive offense which is the basis of count 2." I doubt that the jury would so soon have forgotten the explanation of the presumption of knowledge of illegal importation given earlier, or would have been unable to see its relevance to the conspiracy count. While the whole problem of knowledge of illegal importation might have been more explicitly laid out in the conspiracy charge, and it would have been appropriate for the trial judge to clarify the matter had he been requested to do so, I find no prejudice in the charge as given.

As stated above in the summary of the evidence, there was testimony that Massiah and Anfield had themselves [fol. 14] imported cocaine and that Thorn was present when cocaine was removed from shipboard. There was evidence that all four appellants had had actual possession of cocaine. In such a case we ought not to magnify our own preferences as to particular language in the charge out of all proportion to the possibilities of misunderstanding and find reversible error, especially when none of the defense counsel made any objection to the charge. Any errors in Judge Wright's charge were harmless and we should disregard them, as Rule 52(a) of the Federal Rules of Criminal Procedure requires us to do. The majority view gets us pretty close to the proposition that a new trial may be had in criminal cases unless the judge's charge is letter perfect even though defense counsel at the time were perfectly satisfied with it and made no suggestions. I would affirm the conspiracy convictions.

Massiah's substantive convictions are affirmed, and the conspiracy convictions of all four appellants are reversed and remanded for a new trial.

WATERMAN, *Circuit Judge:*

As my colleagues have stated in their respective opinions, I concur with Judge Hays in reversing the convictions of all of the appellants on the conspiracy count, and

I concur with Chief Judge Lumbard in affirming the conviction of appelant Massiah on each of the substantive counts.

HAYS, *Circuit Judge:*

Judge Waterman and I agree that the conspiracy convictions of all the appellants must be reversed because of the failure of the trial court adequately to charge all the elements of the offense. I would, in addition, reverse all four [fol. 15] convictions of the appellant Winston Massiah because the admissions upon which the prosecutions were, in part, based were erroneously admitted in evidence at trial, and on this point I dissent from the views of Chief Judge Lumbard and Judge Waterman.

The appellants, along with several others not defendants in the trial below, were indicted for conspiracy to violate sections 173 and 174 of Title 21, United States Code. In addition Winston Massiah was charged under the same indictment, with three substantive counts relating to narcotics violations under 21 U.S.C. § 184(a) (unlawful possession of a narcotic drug on board a United States vessel), 21 U. S. C. §§ 173, 174, and 26 U. S. C. §§ 4701, 4703, 4704(a), 4771(a) and 7237(a) (possession and dealing in narcotics not in original stamped packages).

In his charge to the jury, the trial judge first dealt with the substantive charges against Massiah. In each case he discussed the crime generally and then listed with great clarity and precision the elements that must be found in order to convict, thus unquestionably leaving with the jurors the impression that these listed elements should be the focus of their consideration. When the trial judge reached the conspiracy charges, he erroneously stated that the conspiracy was charged under the general conspiracy statute 18 U.S.C. § 371, rather than the conspiracy clauses of 21 U. S. C. § 174. While this misconception was not in itself prejudicial, it is the source and the explanation of the errors that followed.[1] The trial judge went on to state

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[1] An additional indication of the trial court's misconception, although again not in itself prejudicial for the reasons stated in

[fol. 16] that the conspiracy alleged in the indictment was a conspiracy to violate sections 173 and 174 of Title 21, and to read the pertinent portions of the statute to the jury. Continuing under his misconception that the conspiracy was charged under the general conspiracy statute the judge then discussed extensively the general rules of the law of conspiracy. In conclusion, he summarized the elements which the jury would have to find as follows:

> "In order to establish the offense of conspiracy charged in this indictment the evidence must show beyond a reasonable doubt, first, that the conspiracy described was formed and existed at or about the time alleged. Second, that the accused knowingly and wilfully became members of the conspiracy. Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment on or about the time alleged, at the time and place alleged. And fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged."

The trial judge failed *at any point* in his charge on the conspiracy count to instruct the jury that knowledge of illegal importation was a necessary element of the conspiracy. And, in addition to what must have been taken by the jury to be an all-inclusive listing of the necessary elements of the crime charged, other statements in the court's general discussion of the law of conspiracy suggested to the jury that knowledge of importation was not necessary:

> "One may become a member of a conspiracy *without full knowledge of all the details of the conspiracy or of all of the conspirators.*
>
> "To participate knowingly and wilfully means to participate voluntarily and understandably and with

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Chief Judge Lumbard's opinion, was the failure of the court to mention the presumption arising from possession. It is, of course, irrelevant that the jury must have found possession, in at least some instances, because knowledge of importation is not automatically presumed as a matter of law from possession, but is an inference that the jury is *permitted* to make. *United States* v. *Mont*, —— F. 2d ——, —— (2d Cir. 1962).

[fol. 17] specific intent to do some act which the law forbids, or with specific intent to fail to do some act which the law requires to be done; that is to say, to participate with bad purpose either to do bad or to disregard the law. So if a defendant or any other person with understanding of the unlawful character of a plan intentionally encourages, assists, advises, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and wilful participant in the scheme, a conspirator." (Emphasis supplied.)

Thus, the court charged under the wrong statute (18 U. S. C. § 371) and in so doing omitted to charge, indeed rejected the idea, that the jury must find that the drugs were imported to the knowledge of each defendant in violation of law. Judge Waterman and I find no justification in law or logic for the assertion that this charge was saved by the court's earlier recital of section 173 or by the proper charge on the count charging Massiah with a substantive violation of sections 173 and 174 of Title 21. In view of the charge as a whole, in which the essential elements of each offense were carefully enumerated for the jury, it must be assumed that the jury relied on the court's listing of the elements, and did not consider additional elements provided by their own interpretation of the elements involved in a conspiracy violation of section 174, a question so complex that it has recently evenly divided this court. *United States* v. *Santore*, 290 F. 2d 74 (2d Cir. 1960) (*in banc*). Considering the charge as a whole, Judge Waterman and I are convinced that the jury could not have had the slightest idea that they must find knowledge of importation in order to convict under the conspiracy count.

In a criminal case, the defendant is entitled to have the jury instructed on all the elements that must be proved to establish the crime charged. *United States* v. *Gillilan*, 288 [fol. 18] F. 2d 796 (2d Cir.), cert. denied, 368 U. S. 821 (1961); *Kelley* v. *United States*, 275 F. 2d 10 (D. C. Cir. 1960).

In the present case, the appellants raised no objection to the charge as given, see Rule 30, Federal Rules of Criminal Procedure, but the omission to charge an element of the offense is "plain error," see Rule 52(b), requiring reversal even if the point was not raised below. *Screws* v. *United States*, 325 U. S. 91, 107 (1945); *United States* v. *Levy*, 153 F. 2d 995, 998-99 (3d Cir. 1946); *Williams* v. *United States*, 131 F. 2d 21 (D. C. Cir. 1942). "In a criminal case a court should instruct on all essential questions of law involved in the case, whether requested or not." *Kreiner* v. *United States*, 11 F. 2d 722, 731 (2d Cir.), cert. denied, 271 U. S. 688 (1926); see *Morris* v. *United States*, 156 F. 2d 525, 527 (9th Cir. 1946). In *United States* v. *Noble*, 155 F. 2d 315 (1946), the Third Circuit stated the governing considerations:

> "We think it is self evident that a jury cannot perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime which he is alleged to have committed. We think it equally self evident that the only appropriate source of that knowledge is the trial judge, whose traditional function has always included that of instructing the jury upon the law. It was because of the failure of the trial judge to give this necessary guidance to the jury that we recently reversed the judgment of conviction in United States v. Levy, 3 Cir., 1946, 153 F. 2d 995. We deemed the error so fundamental that we took note of it even though the defendant had not requested the instructions." 155 F. 2d 316-17.

"[W]here the error is so fundamental as not to submit to the jury the essential ingredients of the * * * offense [fol. 19] * * * it is necessary to take note of it on our own motion." *Screws* v. *United States, supra* at 107.

Although there concededly was sufficient evidence in this case from which the jury could find or presume knowledge of illegal importation, this provides no ground for assuming that it would have done so had the issue been presented to it.

As Judge Waterman concurs in this portion of my opinion, the conspiracy convictions are reversed.

On July 20, 1959, sometime after his arrest, appellant Massiah was indicted with Jesse Colson on three counts, charging substantive and conspiracy violation of 21 U. S. C. § 184a and conspiracy in violation of 21 U. S. C. §§ 173, 174.[2] On July 22, having previously retained counsel, Massiah, along with Colson, pleaded not guilty and was released on bail. Thereafter, without Massiah's knowledge, Colson decided to cooperate with the government. On November 19, 1959 a customs investigator, Finbarr Murphy, placed a transmitter in Colson's car with Colson's knowledge and instructed him to invite Massiah to take a ride with him in the car and to engage Massiah in conversation relating to the alleged crimes. Murphy, who was in another car, was able to pick up this conversation. At trial, he testified to certain admissions that he was able to overhear in this manner. The content of the statements is outlined in Chief Judge Lumbard's opinion.

Massiah's counsel objected, without success, to the admission of Murphy's testimony. That contention is renewed on appeal, in part on the ground that, when a defendant under indictment after preliminary examination [fol. 20] has retained counsel, direct contact between the government and the defendant violates defendant's right to counsel.

In *Spano* v. *New York*, 360 U. S. 315 (1959), the Supreme Court reversed a state criminal conviction on the ground that a confession coerced as a matter of law had been received in evidence. Justices Black, Douglas, Brennan and Stewart, concurring, strongly expressed the view that the confession was inadmissible and the conviction should be reversed without regard to the element of coercion because the police interrogated the defendant after his indictment (but before his preliminary examination) in the absence of counsel, 360 U. S. at 324, 326. Although this view was expressed by only four Justices in *Spano*, the

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[2] It is of no moment, as far as the admission of Massiah's statements is concerned, that the indictment under which Massiah was charged in July, 1959 was superseded by a broader indictment, including additional counts against Massiah and additional defendants, that was made possible in part by the information surreptitiously obtained from Massiah.

question was left open by the others who voted for a reversal on other grounds. Considering that a stricter standard of conduct is imposed by the federal courts on federal law enforcement officials, see *NcNabb* v. *United States*, 318 U. S. 332, 340 (1943); *Marshall* v. *United States*, 360 U. S. 310 (1959), it is reasonable to assume that federal officers must deal through and not around an attorney retained by a defendant under indictment.

Since *Spano*, the New York Court of Appeals has adopted a strict rule rendering inadmissible all statements obtained from an accused after indictment where not made in the presence of counsel; *People* v. *Waterman*, 9 N. Y. 2d 561 (1961); *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). Indeed, that court has recently extended the rule to include statements made by an accused after arraignment but before indictment. *People* v. *Meyer*, 11 N. Y. 2d 162 (1962).[3]

> "[T]he initiation of a criminal action against the accused by the finding of an indictment operates to im-
> [fol. 21] pose certain disabilities upon the People. The People would manifestly not be permitted at the trial to call the defendant to the witness stand to establish their case through his testimony. * * * By the same token, they may not circumvent the defendant's privilege against self incrimination by introducing into evidence inculpatory statements obtained from him following indictment) at a private examination prior to the trial, * * *" *People* v. *Waterman*, *supra*, at 566.

Certainly, if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon than the defendants in any of the cases cited above because he did not even know that he was under interrogation by a government agent. Cf. *Spano* v. *New York*, *supra* at 323.

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[3] In *Meyer*, the court indicated that the rule applies even when a defendant is informed of his right to have counsel present and makes no request for his attendance.

The admissions were introduced generally against Massiah on all four counts. Because the statements were inadmissible, I would reverse Massiah's conviction on all counts. It is irrelevant that other substantial evidence of guilt was introduced at trial. It is not for us to speculate on the course the jury would have taken had these damaging admissions not been before them. *Spano* v. *New York*, *supra* at 324; *Payne* v. *Arkansas*, 356 U. S. 560, 568 (1958).

I would reverse the substantive convictions of Massiah, as well as all the conspiracy counts, for new trials.

[fol. 22]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WINSTON MASSIAH, MITCHELL ANFIELD, ICKY THORN, LEONARD ROYAL AIKEN, DEFENDANTS-APPELLANTS, JESSE COLSON, ET AL., DEFENDANTS.

JUDGMENT—July 27, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of conviction of Winston Massiah be and it hereby is affirmed as to the substantive counts.

Further ordered, adjudged and decreed that the orders of conviction of said District Court of all four appellants as to the conspiracy counts be and they hereby are reversed and the action remanded for a new trial in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

[fol. 23]

[File Endorsement Omitted].

[fol. 24]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WINSTON MASSIAH, DEFENDANT-APPELLANT

ORDER DENYING PETITION FOR REHEARING, ETC.—
October 23, 1962

A petition for rehearing having been filed herein by counsel for the appellant Winston Massiah together with a motion in the alternative to stay the issuance of the mandate and reduce bail pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that the petition for rehearing be and it hereby is denied.

Further ordered that the motion to reduce bail be and it hereby is denied.

Further ordered that the issuance of the mandate be and it hereby is stayed in accordance with the provisions of Rule 28(c) of the rules of this court.

A. DANIEL FUSARO
Clerk

[fol. 25]

[File Endorsement Omitted]

[fol. 26]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

WINSTON MASSIAH, MITCHELL ANFIELD, LEONARD ROYAL AIKEN, and ICKY THORN, APPELLANTS

ORDER DENYING PETITION FOR REHEARING IN BANC—
October 31, 1962

Vincent L. Broderick, United States Attorney, Southern District of New York, New York, N. Y., for appellee.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

31 Oct 1962

[fol. 27]

[File Endorsement Omitted]

[fol. 28]

SUPREME COURT OF THE UNITED STATES
No. ——, October Term, 1962

WINSTON MASSIAH, PETITIONER

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—November 23, 1962

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 3, 1962.

/s/ John Marshal Harlan
Associate Justice of the Supreme Court of the United States.

Dated November 23, 1962

[fol. 29]

SUPREME COURT OF THE UNITED STATES
No. 775 Misc., October Term, 1962

WINSTON MASSIAH, PETITIONER

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 10, 1963

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1171.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 703705 221

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 199

WINSTON MASSIAH; PETITIONER,

VS.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Volume II

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr. 206

UNITED STATES OF AMERICA,

v.

WINSTON MASSIAH, JESSE COLSON, MITCHELL ANFIELD, GRANVILLE SMITH, NOEL MAXWELL, WILLIAM ADAMS, JOHN HENRY PURRY, CLARENCE WHITE, NICK HOLIDAY, ICKY THORN, SYLVIA FERRIS, JOHN DOE, a/k/a "LEON", meaning thereby to describe a Negro male LEONARD R. AKIN of medium complexion, with black hair and a medium build, approx. 40 yrs. old, approx. 5' 9" tall, and weighing approx. 165 lbs., Defendants.

INDICTMENT—Filed March 3, 1961

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, Winston Massiah, Jesse Colson and Mitchell Anfield, the defendants, did unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board a vessel of the United States, to wit, the S.S. Santa Maria, while engaged on a foreign voyage, a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship's stores.

(Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2.)

[fol. b] Second—Count

The Grand Jury further charges:

On or about the 6th day of May, 1958 in the Southern District of New York, Winston Massiah, Jesse Colson and Mitchell Anfield, the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the trans-

portation, concealment and sale of a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code), and Title 18, Section 2, United States Code.)

[fol. c] Third—Count

The Grand Jury further charges:

On or about the 18th day of June, 1956, in the Southern District of New York, Granville Smith, the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 50 grams of cocaine, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

[fol. d] Fourth—Count

The Grand Jury further charges:

On or about the 18th day of June, 1956, in the Southern District of New York, John Henry Purry, Clarence White and Nick Holiday, the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the trans-

portation, concealment and sale of a narcotic drug, to wit, approximately 50 grams of cocaine, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited:

(Title 21, Sections 173 and 174, United States Code).

[fol. e] Fifth—Count

The Grand Jury further charges:

On or about the 31st day of July, 1956, in the Southern District of New York, Granville Smith, the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 25 grams of cocaine, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

[fol. f] Sixth—Count

The Grand Jury further charges:

On or about the 31st day of July, 1956, in the Southern District of New York, Noel Maxwell, the defendant, unlawfully wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug to wit, approximately 25 grams of cocaine, after the said narcotic drug had been imported and brought

into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.)

[fol. g] Seventh—Count

The Grand Jury further charges:

On or about the 6th day of May, 1958, in the Southern District of New York, Winston Massiah, Jesse Colson and Slyvia Ferris, the defendants, unlawfully, wilfully and knowingly did purchase, possess, dispense and distribute a certain narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, in that the said defendants did not purchase, possess, dispense and distribute said narcotic drug in or from the original stamped package.

(Title 26, Sections 4701, 4703, 4704(a), 4771(a) and 7237(a), United States Code).

[fol. h] Eighth—Count

The Grand Jury further charges:

1. From on or about the 1st day of January, 1956, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, Winston Massiah, Jesse Colson, Mitchell Anfield, Granville Smith, Noel Maxwell, William Adams, John Henry Purry, Clarence White, Nick Holiday, Icky Thorn, Sylvia Ferris, and John Doe, a/k/a "Leon", meaning thereby to describe a Negro male, of medium complexion, with black hair and a medium build, approximately 40 years old, approximately 5'9" tall and weighing approximately 165 lbs., the defendants, and Fadul Rene Harb Huasaff, Richard Roe, a/k/a "Rene", meaning thereby to describe a Caucasian male, of a light complexion with dark hair and a medium build, 35 to 45 years old,

approximately 5'5" tall and weighing approximately 165 lbs., Amanda Huasaff, Helen Hoe, meaning thereby to describe the sister of Amanda Huasaff, a Caucasian female of a light complexion with dark hair and a medium build, approximately 53 years old, approximately 5'5" tall and weighing approximately 135 lbs., Paul King, James Barber, James Hunter, James Billips, Tony Gumbs, Joe Perry, Gerald Youngblood, Clyde Cadogan, Paul Washington, Sonny Campbell, Arthur Conquist, Harold Hoe, meaning thereby to describe the brother-in-law of Amanda Huasaff, a Caucasian male, of light complexion with black hair and a medium build, approximately 55 years old, approximately 5'5" tall and weighing approximately 160 lbs., and George Goe, a/k/a "Canales", meaning thereby to describe a Caucasian male with an olive complexion, with dark hair and a medium build, 35 to 45 years old, approximately 5'8" tall and weighing approximately 150 lbs., named as co-conspirators but not as defendants, and divers other persons to the Grand Jury unknown, did unlawfully, wilfully and knowingly combine, confederate, conspire and agree together and with each other to commit certain offenses against the United States, to wit, to violate Sections 173 and 174 of Title 21, United States Code.

[fol. i] 2. It was a part of said conspiracy that the above-mentioned defendants, and their co-conspirators, would unlawfully, wilfully and knowingly import and bring narcotic drugs, to wit, cocaine, into the United States, in violation of Sections 173 and 174 of Title 21, United States Code.

3. It was further a part of said conspiracy that the above-mentioned defendants, and their co-conspirators, would unlawfully, wilfully and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs, to wit, cocaine, the exact amount thereof being to the Grand Jury unknown, after said narcotic drugs had been imported and brought into the United States contrary to law, and knowing that said narcotic drugs had been imported and brought into the United States contrary to law, in violation of Sections 173 and 174 of Title 21, United States Code.

Overt Acts

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about June 18, 1956, the defendants Granville Smith, John Henry Purry, Clarence White and Nick Holiday, had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

2. On or about July 31, 1956, the defendants Granville Smith, Winston Massiah and John Henry Purry had a conversation in a bar at 10th Avenue and 17th Street, New York, New York.

3. On or about July 31, 1956, defendant Winston Massiah had a conversation with co-conspirator James Barber aboard the vessel S. S. Santa Luisa.

4. On or about July 31, 1956, defendants Noel Maxwell and Winston Massiah had a conversation at 19 West 128th Street, New York, New York.

[fol. j] 5. On or about July 31, 1956 defendants Noel Maxwell, William Adams and Winston Massiah had a conversation at 19 West 128th Street, New York, New York.

6. In or about the month of August, 1956 defendants Mitchell Anfield, John Henry Purry, Clarence White and Nick Holiday had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

7. On or about October 8, 1956 defendants Noel Maxwell, William Adams and Winston Massiah had a conversation at 19 West 128th Street, New York, New York.

8. On or about October 10, 1956 defendants Noel Maxwell, William Adams, Mitchell Anfield and Winston had a conversation at 19 West 128th Street, New York, New York.

9. On or about October 11, 1956 defendants John Henry Purry, Clarence White and Nick Holiday had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

10. On or about October 11, 1956 defendants Clarence White, Winston Massiah and Nick Holiday had a conversation at 19 West 128th Street, New York, New York.

11. On or about December 10, 1956 defendants John Henry Purry, Clarence White and Nick Holiday had a con-

versation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

12. On or about December 10, 1956 co-conspirator James Hunter went to the vicinity of 8th Avenue and 16th Street, New York, New York.

13. On or about December 10, 1956 defendants Mitchell Anfield, John Henry Purry, Clarence White and Nick Holiday had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

[fol. k] 14. On or about June 4, 1957 co-conspirator James Barber went to a bar in the vicinity of 8th Avenue and 16th Street, New York, New York.

15. On or about July 17, 1957 co-conspirator James Hunter went to a bar in the vicinity of 8th Avenue and 16th Street, New York, New York.

16. On or about July 31, 1956 co-conspirator James Barber went to the vicinity of 8th Avenue and 16th Street, New York, New York.

17. On or about August 26, 1957 co-conspirator James Hunter went to the vicinity of 8th Avenue and 16th Street, New York, New York.

18. On or about November 18, 1957 co-conspirator James Billips went to the vicinity of 17th Street and 9th Avenue, New York, New York.

19. On or about December 30, 1957 co-conspirator James Billips went to the vicinity of 9th Avenue and 17th Street, New York, New York.

20. On or about February 10, 1958 co-conspirator James Billips went to a bar in the vicinity of 9th Avenue and 17th Street, New York, New York.

21. On or about May 6, 1958 defendant Winston Massiah was in possession and control of a quantity of adhesive tape aboard the vessel S.S. Santa Maria.

(Title 21, United States Code, Sections 173 and 174).

Morton S. Robson, United States Attorney.

John C. Bunny, Foreman.

[fol. l] March 13, 1961. Anthony F. Marra, Assigned as Attorney to Slyvia Ferris.

B. Moldow, of counsel, Pleading adjd. to 3/14/61.
MacMahon, J.

March 15, 1961. Anthony F. Marra, Esq. relieved of assignment as attorney for Sylvia Ferris—

Defendant has retained other counsel.

Sylvia Ferris Pleads not guilty—Remanded in lieu of bail $3000 fixed on 3/6/61. MacMahon, J.

March 16, 1961. Clarence White—Produced in Court on writ and Pleads not guilty. Murphy, J. O.

May 13, 1961. John Doe, a/k/a Leon, true name Leonard Royal Aiken—

Deft. brought to Court on warrant. Arraigned in chambers, following his arrest on warrant. Bail fixed at $20,000. Remanded in lieu of bail. Weinfeld, J.

May 15, 1961. Leonard Royal Aiken—Pleads not guilty —Bail of $20,000 fixed on 5/13/61 by Judge Weinfeld continued in the same amount. Deft. remanded in lieu of bail.
Dimock, J.

—June 13, 1961. Gov't. Motion to sever as to Defts. Jesse Colson and Sylvia Ferris from trial—Granted.

Trial begun before Wright, J., with a jury as to defts.— Massiah, Anfield, Maxwell, Adams, Purry, White, Thorn, and John Doe (true name Leonard R. Aiken).

Deft. Clarence White produced in Court on a writ from State Prison, Dannemola, N. Y.

[fol. m] On Motion of the Government the following defts.—Winston Massiah, Mitchell Anfield, Noel Maxwell, William Adams, John Henry Purry, Icky Thorn, and Leonard Aiken—Ordered REMANDED— Wright, J.

June 14, 1961. Trial continued and concluded—

Defts.—Massiah, Anfield, Maxwell, Adams, Purry, White, Thorn and Leonard Aiken. Motion for a mistrial granted. Defts. remanded. Wright, J.

June 15, 1961. Gov't. Moves to Vacate the severance of Deft. Jesse Colson and proceed to trial. Court vacates the severance of the Deft. Jesse Colson.

Deft. Jesse Colson (Atty. present) withdraws plea of not guilty and pleads Guilty to counts 1-2-7 and 8

June 15, 1961. Deft. Jesse Colson—Sentenced to Eight

(8) years on each of Counts 1-2-7 and 8, to run concurrently with each other, at a place of confinement designated by the Atty. General of the U.S. Deft. Remanded—Wright, J.

Government moves to sever the Defts. Maxwell, Adams, Purry, and White—Granted.

The Court fixes the same amount of bail previously had by the Defts. Maxwell, Adams and Purry. Maxwell bail fixed $3500.—Adams bail fixed $3500.—Purry bail fixed $3000. Defts. Remanded in lieu of bail.

June 15, 1961. Trial begun before Wright, J., with a jury as to Defts. Massiah, Anfield, Thorn and Aiken.

June 16, 1961. Trial Cont'd—

June 19, 1961. Trial Cont'd.—

[fol. n] June 20, 1961. Trial Cont'd.—

June 21, 1961. Trial Cont'd.—

June 22, 1961. Trial Cont'd.—

June 23, 1961. Trial Cont'd.—

On Motion of the Government bail fixed as to the following Defts.—

Winston Massiah—Bail fixed at $15,000.
Mitchell Anfield—Bail fixed at $7,500.
Icky Thorn—Bail fixed at $7,500.
Leonard Aiken—Bail fixed at $30,000.
All Defts. remanded in lieu of bail. Wright, J.

June 26, 1961. Trial Cont'd.—

June 27, 1961. Trial Cont'd—

Deft. Massiah moves to dismiss counts 1-2-7 was denied.

Deft. Anfield moves to dismiss counts 1-2 and 8 granted as to counts 1 and 2—denied as to count 8.

Deft. Thorn moves to dismiss count 8—Denied.

Deft. Aiken moves to dismiss count 8—Denied.

June 28, 1961. Trial Cont'd.—

June 29, 1961. Trial Cont'd—

Jury verdict—Deft. Massiah guilty on counts 1-2-7 and 8.

Deft. Anfield, Thorn and Aiken. Guilty on count 8 jury polled.

Defts. Massiah, Anfield, Thorn and Aiken move to set aside the verdict, and for a new trial—denied.

Winston Massiah (atty. present) sentenced to nine (9) years on each of counts 1-2-7 and 8 to run concurrently with each other.

Bail pending appeal fixed at $15,000. Wright, J.

[fol. o] June 29, 1961. Mitchell Anfield—(atty. present) sentenced to nine (9) years on count 8.

Bail pending appeal fixed at $15,000. Wright, J.

Icky Thorn—(atty. present) sentenced to nine (9) years on count 8.

The Marshal is instructed to make a determination as to whether or not the deft. is eligible to go to U.S. P.H.S. Hospital, Lexington, Kentucky for a cure of his addiction prior to being sent to customary institution.

Bail pending appeal fixed at $15,000. Wright, J.

Leonard Royal Aiken—(atty. present) sentenced to thirteen (13) years on count 8.

Bail pending appeal is fixed at $50,000. Wright, J.

[fol. p] March 3, 1961. Granville Smith, Neil Holiday, John Doe—("Leon") Warrants of arrest ordered.

Bicks, J.

March 6, 1961. Sylvia Ferris—Bail fixed at $3,000. Remanded in lieu of bail.

Pleading adjd. to 3-13-61. MacMahon, J.

March 9, 1961. Winston Massiah Pleads not guilty—bail of $7,500. in Cr 159-216 to be rewritten to cover this indictment by 3-13-61.

Jesse Colson Pleads not guilty—bail of $7,500. in Cr 159-216 to be rewritten to cover this indictment by 4 p.m.

Mitchell Anfield Pleads not guilty—Bail of $2,500. to be rewritten by 4 p.m. today.

Noel Maxwell Pleads not guilty—Bail continued. ($3,500)

William Adams Pleads not guilty—Bail continued. ($3,500)

John Henry Purry Pleads not guilty—Bail continued. ($3,000)

Icky Thorn Pleads not guilty—Bail of $3,000. to be rewritten by 4 p.m. today (Norman D. Archer, Esq. attorney for deft. Thorn admitted pro hac vice)

MacMahon, J.

61 tr. 206

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

WINSTON MASSIAH, et al. (as listed and described in the within indictment), Defendants.

INDICTMENT

Viol: T.21, §§ 173,174 USC, T.21, § 184a, USC, T.18, § 2, USC T.26, §§ 4701, 4703 et seq. USC

Morton S. Robson, United States Attorney.

A true bill

John C. Bunny Foreman.

Filed United States District Court S.D. of N.Y. March 3, 1961

[fol. q] IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr. 206

UNITED STATES OF AMERICA,

v.

WINSTON MASSIAH

JUDGMENT AND COMMITMENT—Filed July 12, 1961

On this 29th day of June, 1961 came the attorney for the government and the defendant appeared in person and [1] by counsel

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly

bringing on board, and having in his possession and control on board of a vessel of the United States engaged on a foreign voyage, a quantity of cocaine. (Title 21, Section 184a & Title 18, Sec. 2 U.S. Code.); receiving, concealing, selling and facilitating the transportation and concealment and sale of cocaine. (Title 21, Secs. 173 & 174 & Title 18, Sec. 2, U.S. Code.); purchasing, possessing, dispensing and distributing cocaine not in or from the original stamped package. (Title 26, Secs. 4701, 4703, 4704(a), 4771(a) & 7237(a) U.S. Code.); conspiracy to violate the narcotic laws. (Title 21, Secs. 173 & 174 U.S. Code.) as charged in counts 1-2-7 and 8 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Nine (9) Years on each of counts 1-2-7 and 8 to run concurrently with each other.

Bail pending appeal fixed at $15,000.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

J. Skelly Wright, United Sates District Judge.

Herbert A. Charlson, Clerk.

A True Copy. Certified this 29th day of June, 1961.

(Signed) Herbert A. Charlson, Clerk.

(By) Otto Waldmann, Deputy Clerk.

KS 6/29/61.

[fol. r] Defendant committed 6/13/61. following arrest: was not released on bail.

Thomas J. Lunney.

Warden federal detention Hdqrts., New York, N. Y. for service of sentence at that institution, or for transportation to another institution designated by the attorney general, by prison van.

Thomas J. Lunney United States Marshal Southern District of New York.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on June 30, 1961 to—
Defendant noted appeal on—.
Defendant released on—.
Defendant elected, on — not to commence service of the sentence.
Defendant's appeal determined on—.
Defendant delivered on—to—at —, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

——, ——
United States Marshal.

[fol. s] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr. 206

UNITED STATES OF AMERICA,

vs.

WINSTON MASSIAH, Defendant,

NOTICE OF APPEAL—Filed June 30, 1961

Acknowledgment of service (omitted in printing)

Offense: Violation of Title 21 United States Code Section 184a and Title 18 United States Code, Section 2 and Title 21 Section 173 and 174 and Title 26 Sections 4701, 4703 4704(a) and 4771(a), and 7237(a) United States Code and Title 21 Section 173 and 174.

Date of Judgment: June 29, 1961

Sentence: 9 years imposed following trial and conviction by jury on each count, sentence to run concurrently.

Now confined in Federal Detention Headquarters # 427 West Street New York City, N.Y.

The appellant hereby appeals from the judgment of conviction and sentence thereon to the United States Court of Appeals, Second District.

Robert J. Carluccio, Esq., Attorney for Appellant,
150 Broadway, New York City, N.Y.

Dated, New York, June 29, 1961.

[fol. t] Proof of Service (omitted in printing)

[fol. 1] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

61 Cr. 206

UNITED STATES OF AMERICA,

vs.

WINSTON MASSIAH, JESSE COLSON, MITCHELL ANFIELD, GRANVILLE SMITH, NOEL MAXWELL, WILLIAM ADAMS, JOHN HENRY PURRY, CLARENCE WHITE, NICK HOLIDAY, ICKY THORN, SYLVIA FERRIS, JOHN DOE, also known as "LEON", meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approximately 40 years old, approximately 5'9" tall, and weighing approximately 165 lbs., Defendants.

Transcript of Jury Trial

Before: Hon. J. Skelly Wright, D. J., and a Jury.

APPEARANCES:

Robert M. Morgenthau, Esq., United States Attorney, for the Government; By James G. Starkey, Esq., Assistant United States Attorney.

Robert J. Carluccio, Esq., Attorney for Defendant Massiah.

[fols. 2-12] Eugene K. Jones, Esq., Attorney for Defendant Colson.

I. Edward Pogoda, Esq., Attorney for Defendant Anfield.

Jesse Zaslav, Esq., Attorney for Defendants Maxwell, Adams and Purry.

Abraham Solomon, Esq., Attorney for Defendant White.

Norman Archer, Esq., Attorney for Defendant Thorn.

Earl McHugh, Esq., Attorney for Defendant Ferris.

Morris Somers, Esq., Attorney for Defendant Aiken.

. . . . . .

[fol. 13] COLLOQUY

The Court: Do you understand that you have entered a plea of guilty? Do you understand that?

Defendant Colson: Yes.

The Court: Has anybody promised you anything, or threatened you in any way so that you would enter this plea of guilty on the basis of those promises or threats?

Defendant Colson: Judge, my wife and my children were approached in the street and threatened that if I take the [fol. 14] witness stand that they would be killed while I am away, and there were two New York City policemen who stopped me and told me that if I get on the stand and testify that I could be left in a place with my brains blown out, and I would be put in a place like a robber, and I would have my head shot off, and if I should happen to live out of it, who would believe me anyway because I got a police record, and I shot somebody, and I got a narcotic record, and I am an informer.

The Court: What are the names of the two New York City policemen?

Defendant Colson: Your Honor, I wish I knew but I don't know. My wife was approached in the street and threatened and called on the phone, and the agents changed my phone number. They put guards around my house, and my kids can't walk out of the house without a guard, and they can't go to school, and it's got me upset. I wanted to testify but I can't. I just couldn't do it. I tried and they told me I could get all this time, and my wife and children's lives is at stake, and I just couldn't do anything about it. I couldn't leave my wife and kids back here exposed to something like that.

They said it don't happen, but it does. I can just leave it [fols. 15-37] in the hands of God—my guilt.

The Court: My question is whether or not you are pleading guilty by reason of any promises that were made to you.

Defendant Colson: No, sir.

The Court: Are you pleading guilty because of any threats that were made to you by the Government or by anybody else?

(No response.)

The Court: I understand you have been threatened, according to what you say.

The question now is whether or not you are pleading guilty because of any threats. Has anybody threatened you into pleading guilty?

Defendant Colson: No, not in that respect, Judge.

. . . . . .

[fol. 38] ELITA LLOYD, called as a witness in behalf of the government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Stakey:

Q. Will you kindly speak as loudly as you can, Miss Lloyd, so that the jury and the Court can hear you.

A. Yes.

Q. Do you know a man by the name of Winston Massiah, Miss Lloyd?

A. I do.

Q. Do you see him in the courtroom?

A. Yes.

Q. Will you point him out, please.

A. (Witness points.)

The Court: Well, suppose you tell us. Now there is a table, a second table, and the chairs against the little rail there. Now tell us where he is.

The Witness: Right there.

The Court: Will the record show that she identified the defendant.

Q. When did you first meet Winston Massiah, Miss Lloyd?

A. 1950, in May.

Q. Where did you meet him?

A. At my sister's house, at 30 east 128th Street.

[fol. 39] Q. And who introduced you to him?

A. A friend of my sister's.

Q. Were you living there at the time?
A. Yes, I was.
Q. How long did you continue to live there?
A I lived there until July 1st of the same year.
Q. Where did you move to then?
A. To 19 East 128th Street.
Q. Do you know where Massiah lived at that time?
A. Well, he was still living with my sister at 30 East 128th Street.
Q. And he was living there as a roomer?
A. Yes, he was.
Q. Did there come a time when he moved from there, if you know?
A. Yes, there did.
Q. When was that?
A. About September of 1950.
Q. Do you know where he moved to?
A. He came over to live with me at 19 East 128th Street.
Q. Was there a financial arrangement at that time?
A. Yes, there was.
Q. What did you give him and what did he pay?
[fol. 40] A. Well, he paid $6 for the room.
Q. One room?
A. Yes.
Q. How often did he use it thereafter?
A. About, I think, every thirty-some days he would be in for three or four days, five days at the most.
Q. Did he ever tell you where he was during that 30-day period, or 30-odd-day period?
A. At sea.

Mr. Carluccio: Objection. It would be hearsay, where he was.

The Court: That is overruled. The question was what the defendant had told her. Overruled.

Where did he say he was?

The Witness. He was at sea. He was working on a ship.

Q. Now, when was it that he moved in?
A. About September.
Q. How long did he continue to live there?
A. He lived there until '56, around October some time.

Mr. Pogoda. If the Court please, I can't hear this witness.
[fol. 41] The Court: All right, sir.
Would you keep voice up loud so that counsel and the defendants can also hear you as well as the jury?
The Witness: Yes.

Q. Did there come a time, Miss Lloyd, when you met some friends of Massiah?
A. Yes, there did.
Q. At the apartment?
A. Yes.
Q. When did you begin meeting these friends?
A. Around '56 in May or June.

The Court: Keep your voice up.
The Witness: About '56, May or June.

Q. Do you remember the names of any of them?
A. Yes, I do.
Q. Whom did you meet in May or June?
A. I met Maxie, Hawk, Jesse, I think—
Q. Do you know what the full name of the man introduced to you as Maxie is?
A. No, I don't know his full name.
Q. Do you recall the name Noel Maxwell?

Mr. Pogoda: I object. He is not one of the defendants on trial. He is not on trial now, and I submit that it has no business in this case.
[fol. 42] The Court: Well, I think counsel is trying to set up proof for his conspiracy which involve not only the ones on trial, but also the others who were named, so I will overrule the objection.
Mr. Carluccio: May I object on the ground that it is leading.
The Court: I will sustain that objection.
Don't lead the witness.

Q. Do you know what Hawk's name is?
A. No, I don't know his name. Just Hawk.
Q. Do you know what Jesse's full name is?
A. Yes, I do.
Q. What is his last name?

A. Colson.

Q. And when did you meet Colson?

A. I met Colson about June or July, I think it was.

Q. At your apartment.

A. Yes, I did.

Q. Who introduced you to him?

A. Winston did.

Q. Did you ever hear any conversations between Winston and Jesse Colson during this period?

A. No, I did not.

[fol. 43] Q. Now, did there come a time, Miss Lloyd, when you saw some men whom you did not recognize, in the apartment?

A. Yes, there did.

Q. When did that occur?

A. That was about October of 1956.

Q. Would you tell the Court and jury exactly what happened on that day.

A. One morning I was making breakfast and the doorbell rang. When I opened the door these two strange men were there to see Winston, so I called to him and he said to let them come in.

Q. Into his room?

A. Yes. They came in. One of them went into his room and one sat in the living room. He asked for a cup of coffee and I gave him the coffee, and asked him did he want some toast, and he said yes, he would take some toast, so I went back to make some toast, and the bell rang again and another man came in.

I asked him did he want coffee, and he said no. So I asked him would he have a drink, and he said yes, and I gave him a drink. I went back into the kitchen, and after a while they left.

So I went in, when I was through doing my work in the kitchen, I went inside, and Winston was very upset.

[fol. 44] So I asked him what happened.

Mr. Carluccio: Objection. I think it is not responsive. All he asked is what happened that day.

The Court: I think we are still on the same day, so I will overrule the objection.

Finish your story, please.

A. (Continuing) I asked him what had happened, and he said that they were not cops.

So I said, "Why cops?"

He got very upset and he was sick and he couldn't answer any more for a long time.

Q. Did he say they were or they were not cops?

A. They were not.

Q. What else did he say then?

A. He got sick, and we had to call the doctor for him. He was very upset.

Q. Did you have any further conversation with him?

A. Later that evening I asked him what really happened, and he said that he had some money——

Mr. Pogoda: If the Court please, I object to any conversation not in the presence of the defendant Anfield [fol. 45] insofar as it relates to the defendant Anfield.

The Court: The Court will overrule the objection. I assume counsel is attempting to prove the conspiracy, and the acts and statements of any one of the conspirators in furtherance of this conspiracy are admissible as against all. However, it is a question for the jury as to whether or not these acts and these statements are in furtherance of any conspiracy. Whether or not, first, of course, there will be a conspiracy proved which the jury will have to determine, and then whether or not these acts which are being testified to, if you believe that they happened as the witness says they happened, whether or not they were in furtherance of the conspiracy. But we will get into that as we go along, so let's proceed.

Mr. Starkey: Thank you, your Honor.

By Mr. Starkey:

Q. What were the further conversations that you had with Winston Massiah that day?

A. He said he had some money to go away and they had followed him and taken the money away from him.

Q. Did he say where he got the money?

A. At the bank.

Q. Was there any further conversation?

[fol. 46] A. Not that day. I called him to call the police

and tell them about it, and he said they had threatened him and he couldn't do it.

Q. Now, did there come a time thereafter when you again discussed the events of that day with Massiah?

A. The following evening Jesse Colson came by and he brought some friends there——

Mr. Somers: I can't hear that, your Honor.

The Court: He said that the following evening Jesse Colson came by and brought some friends with him.

Q. Did you have any discussion with Massiah about a gun?

A. Yes, your Honor.

Mr. Somers: I object to that.

Mr. Carluccio: That is leading. There is no testimony whatsoever about a gun.

The Court: That is overruled.

Did you or didn't you?

The Witness: Yes, I did. I asked him if there was supposed to be a gun. I asked him whether it was a real gun or a toy pistol, and he said he didn't know.

Q. A gun in the possession of the men who had been there?

Mr. Carluccio: Objection, your Honor. It is leading.

[fol. 47] The Court: Sustained. Don't lead.

Q. Was there anything else said about the gun?

A. No.

Q. Now, you say Colson came thereafter?

A. Yes, he came the following night and he brought some friends with him.

Q. Did you hear any conversation—how many people were there then?

A. Two people.

Q. Two people with Colson?

A. Yes.

Q. Did you hear any of the conversation then between them and Winston?

A. I overheard something about some money and some stuff.

The Court: Speak up, please. Some money and some stuff? Is that what you said?

The Witness: Yes, your Honor.

The Court: Speak in a loud voice so that everybody can hear you.

Q. Did you hear any more conversation before they left?

A. No, I didn't.

[fol. 48] Q. Did there come a time after they did leave when you had another conversation with Massiah?

A. I asked him what the stuff was about and he said him and Jesse was in something illegal.

Q. What did you say?

A. I got angry then and fussed, I fussed at him and told him that we would have to move away from there.

Q. Was there any further conversation?

A. Another night I think they came back——

The Court: Speak louder, please.

A. (Continuing) They came back the following night again and asked——

Q. What happened on that occasion?

A. Winston wasn't there. He was visiting upstairs. And I went up to get him, and when we were part way dawn the steps Jesse came up and he was fussing and laughing at him for being afraid.

Q. Laughing at Massiah?

A. Yes.

Q. Did you hear any more conversation on that occasion?

A. No, I didn't.

Q. Do you know Mitchell Anfield?

A. No, I don't know him.

[fol. 49] Q. Duke?

A. Yes, I know him.

Q. Did you ever have any conversation with Winston around this time concerning what he and Jesse had been doing?

A. Yes. I asked him what it was.

Q. What did he say?

A. Coke.

Q. When did this conversation occur?

A. One of the nights before he moved away.

Q. What else was said at that time, or what was said beforehand?

A. (No response.)

Q. In connection with his answer?

A. I don't understand the question.

Q. Before he said coke what did you say and what did he say?

A. I asked him what it was they were dealing in, and when he said that, I told him then that it was very dangerous and we were all in a situation where we could either have gotten killed or gone to jail.

Q. Was there any further conversation about this?

A. He said he was sorry and that he would move away.

[fol. 50] Q. Now, when did you first meet the man you know as Duke?

A. A few days after that happened, Jesse brought him by and introduced him to me and said he was his brother.

Q. Do you see Duke in the courtroom?

A. Yes, I do.

Q. Will you point him out, please.

A. Right there (pointing).

Q. What color clothes is he wearing?

A. A pink shirt.

Q. A pink shirt?

A. Yes.

Mr. Starkey: May the record show that the witness has identified the defendant Mitchell Anfield?

The Court: Yes.

Q. Was there any further conversation at that time when Jesse Colson introduced Duke to you?

A. No. He just said hello and asked how is everybody doing, and something like that, and then they left.

Q. Do you know a man by the name of James Barber—Jimmie Barber?

A. Yes, I do.

[fol. 51] Q. When did you meet him?

A. A few days after that happened I met him once. He came to the house one time.

Q. A few days after the business with the strangers in the apartment?

A. Yes.

Q. Did you hear any conversation between him and Massiah at that time?

A. No, I didn't.

Q. Who introduced you to Barber?

A. Well, we were not introduced.

Q. You just saw him?

A. Yes.

Q. In whose presence?

A. (No response.)

Q. Who was there?

A. Winston was there.

Q. Did there come a time thereafter when he did move out, when Massiah did move?

A. Yes, there did.

Q. Do you know where he moved to?

A. He moved over to 8 East 128th Street.

Q. Did there come a time when he talked to you again about moving back in?

A. Yes.

[fol. 52] Q. When was that?

A. About five or six months later.

Q. So that would be in the spring of '57?

A. About that.

Q. What was the conversation you had with him at that time?

A. I don't remember the exact conversation but he wasn't well. He wasn't feeling well, and I think he wasn't working, or something. I am not sure.

Q. Well, what did he say to you, as best you can recall?

A. He said he wasn't working, and he wasn't feeling well, and he didn't want to be there alone because most of the time he was sick. He was supposed to have had a bad heart. And most of the time he would be sick, and he wouldn't have any money, and things like that.

Q. What else was said?

A. And so I told him, all right, he could come on back.

Q. He asked you if he could come back?

A. No.

Q. On that occasion?

A. No, not exactly. We were just discussing his illness [fol. 53] and rough times, and all that, and I told him he

could come on back over there because it was very hard for him alone where he was.

Q. Did you have any discussion about the past at this time?

A. Yes. He said he never would do anything like that again.

Q. And then he did move back in?

A. Yes, he did.

Q. Now, did you see any of his friends around the apartment thereafter?

A. For a long time I didn't see anyone.

Q. How much time passed, would you say?

A. Oh, it must have been a year, I think.

Q. And whom did you see then?

A. Then I saw Maxie and Hawk, they came back about twice and visited him for a while.

Q. And that would be in the spring of '58 or the early part of 1959, about a year later?

Mr. Carluccio: Objection, your Honor. She should testify to the time.

The Court: I think she has already testified that it was about a year later.

In other words, you testified, as I understand it——

[fol. 54] The Witness: I don't know exactly, but it was a very long time. It seemed about a year.

Q. Now, after Massiah returned and you saw Maxie and Hawk again, did there come a time when you saw Jesse?

A. Yes.

Q. When did you see him again?

A. Well, Jesse—he didn't stop coming. He used to come off and on and visit.

Q. When did you see him again after the incident with the men in the apartment, the strange men?

A. I think the day after.

Q. Well, after Winston moved out did you see any more of Jesse before he moved back in?

A. No.

Q. And he moved back in how long after he moved out?

A. About five or six months.

Q. Five or six months after October of '56; is that right?

A. Yes.

Q. Now, after he moved back in then in the early part of 1958, when did you next see Jesse?

A. Well, soon after he moved back in, Jesse came. Jesse would visit him often.

[fol. 55] Q. How often did he visit him thereafter?

A. I can't say exactly how often, but he used to come by every so often.

Q. About how many times would you say you saw him before May of 1958?

A. I can't say in numbers how many times.

Q. Now, did there come a time after you began seeing Maxie, Hawk and Jesse coming around to see Winston again when you received a letter from Winston?

A. Yes, I did.

Q. When was that?

A. That was just before he was arrested.

Q. On this charge?

A. Yes.

Q. And do you remember when he was arrested for this charge on which he is now on trial?

A. It was 1958, either May or June.

Q. And how long before this occurred did the letter come?

A. He was at sea when the letter came.

Q. And how long had it been since you had seen him before the letter came?

A. A few weeks, I think.

Q. He had been out in a few weeks and he had not yet gotten back, and you received a letter?

[fol. 56] A. That's right.

Q. Do you still have the letter?

A. No, I don't.

Q. Do you know what happened to it?

A. I gave the letter to Jesse.

Q. Will you tell the Court and jury what the letter said.

Mr. Pogoda: Objection, if the Court please.

The Court: On what basis do you think the letter is admissible so that she can testify to this?

Mr. Starkey: May I approach the bench, your Honor?

The Court: Well, let me ask you this: How did you know the letter was from Massiah?

The Witness: Because it had his return address on it.

The Court: Is that the only reason why you knew it was from Massiah? Did you know his handwriting, for example?

The Witness: Yes, I did.

The Court: Did you recognize his handwriting in this letter?

The Witness: Yes, I did.

The Court: Did he sign the letter?

[fol. 57] The Witness: I think he did; yes.

The Court: And you recognized the handwriting throughout the letter as being Massiah's?

The Witness: I believe I did.

The Court: Did you customarily receive letters from him?

The Witness: Once in a while. Not very often.

The Court: There isn't any doubt in your mind that this letter was written by Massiah?

The Witness: No, I don't think so.

The Court: Well, the Court is going to overrule the objection. The witness has shown that she doesn't have possession of the letter anymore and consequently she is in a position to testify to what was in it since she does say that she knows that it was written by Massiah, so I will overrule the objection.

Mr. Somers: Your Honor, may I note for the record that I except to that ruling on the ground that the letter, of course, is the best evidence. This is secondary evidence, and the reason given is certainly not sufficient to overcome the rule of best evidence, the best-evidence rule.

The Court: All right, sir.

Proceed. Answer the question. Tell us what was in [fol. 58] the letter.

The Witness: Well, he wrote the usual letter saying "Hello," and "How are you?" and all, and then he sent a message in to Jesse. He said that I should call him and tell him he will bring in some discos, which is a Spanish word for phonograph records; so I called Jesse and gave him the letter.

By Mr. Starkey:

Q. Did you have any conversation with Jesse at that time?

A. No; I just told him that Winston had sent this message to him, and then he asked me to call Duke, and I called Duke, and they came and then they went away.

Q. You called Duke?

A. Yes.

Q. At Jesse's request?

A. Yes.

Q. And what did you say to Duke?

A. That Jesse asked him to meet him at my house.

Q. And did Duke come over thereafter?

A. Yes.

Q. What happened when he arrived?

A. Nothing. He just said hello to me and him and [fols. 59-127] Jesse left. Jesse waited there until he came, and then they left?

Q. Did you see Duke and Jesse thereafter?

A. I saw Jesse after that.

Q. When did you see Jesse next?

A. I don't remember exactly.

Mr. Starkey: I have no further questions of this witness, your Honor.

* * * * * * *

[fols. 128-130] Redirect examination.

By Mr. Starkey:

* * * * * * *

[fols. 131-135] Mr. Somers: I will object to that.

The Court: That is overruled.

What do you mean when you use the word "coke"?

The Witness: I understand it to be cocaine.

* * * * * * *

[fol. 136] JAMES BARBER, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. Barber?
A. Longshoreman.
Q. Do you know Winston Massiah?
A. Yes, I do.
Q. When did you first meet him?
A. In 1956.
Q. What part of the year?
A. During the year.
Q. Do you see him in the courtroom?
A. Yes, I see him behind you.
Q. Will you point him out, please?
A. Behind the gentleman with the glasses on there.

Mr. Starkey: Let the record show that the witness has identified Winston Massiah.

The Court: What kind of shirt has he got on?

The Witness: A tan short, a brown shirt.

The Court: Let the record show that he identified the defendant Massiah.

Q. Where did you first meet Winston Massiah, Mr.
[fol. 137] A. On the ship.
Q. What pier?
A. Pier 58, North River.
Q. That is a Grace Line pier?
A. That's right.
Q. Where have you worked as a longshoreman?
A. What did you say?
Q. Where have you worked as a longshoreman?
A. Me?
Q. Yes.
A. I worked with M. P. Holly, 17 State Street. That was the office. And they had a contract with the Government during the war.

The Court: And where else?

The Witness: I worked for the United States at Pier 59,

but for a short while. And I worked for Preston Stevedoring Company. At least he was the contractor.

Q. Have you been convicted of any crimes?
A. I have, sir.
Q. What ones?
A. I had an assault down South in 1937.
Q. Do you recall any others?
A. Well, I——

[fol. 138] The Court: You were convicted once for assault. Any other convictions?

The Witness: No.

The Court: Is that the only conviction?

The Witness: Walking in, and I worked in where there was gambling, and there was a raid.

The Court: And you were arrested in the raid?

The Witness: I was arrested and taken to enter a plea. I pleaded guilty and I paid $1 and got out.

Q. That was a gambling charge?
A. Yes.
Q. And the word you used was "raid"?
A. Yes.
Q. When you first met Massiah in the spring of 1956, did you have a conversation with him?
A. I did so.
Q. What did he say and what did you say?
A. He asked me did I want to take a package out for him and make some money, and I said, "Like what?" I said, "What's in it?"

He said, "Don't worry about it."

Q. And this was aboard a Grace Line vessel?
A. That's right.
Q. And what did you say then?

[fol. 139] A. I told him I would meet him at eleven o'clock.

Q. And did you see him?
A. I did so.
Q. What happened then?
A. He gave me the package, and I walked to Eighth Avenue, and he walked in front of me.
Q. And then what happened?

A. I walked into the men's room on the ship and I gave it to him.

Q. On the ship?

A. I mean in the bar.

Q. And you gave him the package?

A. That's right.

Q. Did you have any conversation at that time?

A. He said he would see me later.

Q. And did you see him later?

A. I did so.

Q. And what happened then?

A. I was on the gangplank and he gave me some money.

Q. Did there come a time thereafter when you saw him again?

A. Yes. About six weeks later.

Q. Was it another Grace Line ship at that time?

A. That's right.

[fol. 140] Q. And what was the conversation you had with him?

A. Well, I met him in the hallway, and he said he had another package he wanted me to take off, and I told him I would meet him around about 9:30.

Q. And did you meet him?

A. I did.

Q. What happened then?

A. He gave me the package and I walked to the same bar and he was behind me.

Q. What happened at the bar?

A. I gave him the package and he kept going. What was in it, I don't know.

Q. Did you have a conversation with him at that time?

A. I didn't.

Q. Was there any talk about payment?

A. Oh, he told me he would see me later on the ship.

Q. Did you see him later?

A. I did.

Q. What happened then?

A. He gave me some money but how much I don't remember.

Q. Now, did there come a time thereafter, Mr. Barber, when you met a man by the name of Jesse Colson?

[fol. 141] Q. Who introduced you to him?

A. Sonny.
Q. Who do you mean by Sonny?
A. Winston.
Q. Winston Massiah?
A. That's right.
Q. Where did he introduce you to him?
A. In the sleeping quarters on the ship.
Q. What was the conversation at the time?
A. He told me—he said that I was a friend of his and I was O.K.
Q. Was there anything else said?
A. Colson told me to wait and he had a package for me to take off the ship, and I waited in the room, and he went and got it, and he brought it to me and I take it off the ship.
Q. What did you do with it then?
A. I went down in the subway and gave it to him on the subway.
Q. Who did you give it to?
A. To Jesse. To Jesse Massiah.
Q. You gave it to whom?
A. To Jesse.

The Court: Jesse who?
[fol. 142] The Witness: Colson.

Q. Did there come a time thereafter when you carried off a package and didn't get paid?

Mr. Carluccio: Objection, your Honor.
The Court: Don't lead the witness.
Mr. Starkey: I am sorry, your Honor.
The Court: Did this come to an end? Did this arrangement come to an end?
The Witness: Yes.
The Court: Tell the jury how it came to an end.
The Witness: On what occasion?
The Court: Did you stop carrying packages off the ship?
The Witness: I did so at that time but——
Mr. Starkey: Your Honor, if I may put this question:

Q. Did there come a time when it ended in so far as Winston Massiah was concerned?
A. Yes.

Q. Will you tell the Court what happened at that occasion and right before it?

A. Well, I——

Mr. Pogoda: May I at this time ask Mr. Starkey through your Honor, whether this is under the conspiracy count [fols. 143-144] or under the Counts 1 and 2?

The Court: What is it, Mr. Starkey?

Mr. Starkey: This would be, I think, admissible only under the conspiracy count, your Honor.

The Court: Let us proceed.

Tell us what happened.

The Witness: At what occasion now?

Q. The last time you carried off a package for Winston.

A. No, I never take anything else off for him.

Q. What happened on the last occasion?

A. Which occasion are you speaking about now?

Q. The last occasion on which you carried off for Winston Massiah.

A. Well, I didn't get any money.

Q. Well, how did that happen? You tell that to the Court and jury.

* * * * * * *

[fol. 145] The Witness: Well, I only said I took the package off and I didn't get paid. That's all I can say.

Q. When did you first talk to him on this occasion about carrying the package off?

Mr. Somers: Talk to whom?

The Witness: Where did I first talk to him at?

Mr. Pogoda: To which defendant?

Q. The question was with reference to your breaking off with Massiah. That was the question. Now, you said that you didn't get any money the last time you took the package off. Now, we want to know all about that. Tell us where it was, and what happened, what he said to you and what you said to him.

A. Well, I just said that I brought the package off and he said that I would see him at his house.

Q. From where did you carry the package?
A. To Eighth Avenue, in the bar.

[fol. 146] Q. And where did you start?
A. From aft of the No. 5 hatch.
Q. On the ship?
A. Yes.
Q. And you had a conversation with him at that time?
A. Not too much.
Q. Well, yes, but what was the conversation?
A. He asked me would I take the package off of the ship.
Q. Yes. And what did you say?
A. I said yes.
Q. O.K. Now, did there come a time then when you did?
A. That was the time then.
Q. What did you do with the package?
A. I gave it to him on Eighth Avenue in a bar.
Q. What did he say to you at that time?
A. He said he would see me later at his house.
Q. And did you see him later?
A. I did so.
Q. How much later?
A. The following Saturday.
Q. Did you have a conversation with him then?

[fols. 147-151] A. (No answer.)

Q. At his house?
A. Well, I only stayed there about five minutes.
Q. The question, Mr. Barber, was did you have a conversation with him?

The Court: What did he say? Tell us what happened at the house.

The Witness: He only told me, he said he didn't have any money because he was stuck up, and I only stayed there about five minutes and I walks out.

* * * * * * *

[fol. 152] June 16, 1961, 10:30 a.m.

Redirect examination.

By Mr. Starkey:

Q. Now, Mr. Barber, at the time that we recessed yesterday you were telling the Court and the jury about the conversation you had with Winston Massiah at his home. Do you recall that?

A. Yes.

Q. When did that take place?

A. In 1956.

Q. Do you recall when in '56?

A. In the spring of the year.

Q. At his home?

A. At his home? Yes, at his home.

[fol. 153] Q. When did you meet Winston Massiah?

A. 1956.

Q. When?

A. On the ship.

Q. When in '56?

A. In the spring of the year.

Q. Now when did you see him at his home?

A. On a Saturday at noontime.

Q. And what was the conversation you had with him at that time?

A. Well, he just told me that he didn't have any money, that the cocaine was taken away from him.

Q. That the what was taken away from him?

A. The cocaine.

Q. Did he say anything else?

A. Jesse walks in and he said like "I don't believe it" and I only stayed there a few minutes and I left.

Q. Did Jesse say anything when Winston said you didn't believe it?

A. He said, "Yes, that's true."

Q. What did he say was true?

A. That the cocaine was taken away from him.

Q. Now, when did that happen?

A. In 1956.

[fols. 154-295] Q. What part of '56?

A. I would say as near as I can remember the spring of the year.

Q. You mean it happened at the same time you met Winston Massiah?

A. No. It happened six months later.

Q. Six months after you met him?

A. That's right.

Q. Well, then, that wouldn't be in the spring, would it?

A. That would be in the spring. I said that is the best I could remember it was in the spring.

Q. I mean if it happened six months after you met him.

A. That would be in the fall.

Q. Now, you testified that you had carried packages off for Jesse Colson.

A. That's right.

Q. How many times did you do that?

A. Only twice.

Q. When was the first time you carried off for him?

A. Three months later, after I met Winston.

Q. And that was when you met Jesse?

A. That is when I met Jesse.

* * * * * * *

[fol. 296] PAUL KING, called as a witness by the government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, sir?

A. Merchant seaman.

Q. How long have you been a seaman?

A. Ever since I have been 15 years old.

Q. Do you know Jesse Colson?

A. Yes, I did.

Q. When did you first meet him?

A. I met him in 1946 in Odessa, Russia.

Q. Did there come a time thereafter when you renewed your acquaintance with him in 1958?

A. Yes, sir.

Q. Did there come a time in 1958 when you sailed on the Santa Maria of the Grace Lines?

A. Yes, sir.

Q. Do you recall when it was that you sailed on that occasion, Mr. King?

A. It was February. I joined the ship on February 26th.

Q. And how long after that did you sail?

A. It was March 1st.

Q. Did there come a time, after you signed on, that you [fol. 297] had a conversation with Jesse Colson?

A. Yes, sir.

Q. Where did that conversation take place?

A. At his home.

Q. What did he say to you and what did you say to him at that time?

Mr. Pogoda: If the Court pleases, I assume this is with reference to count 8 of the indictment.

The Court: This is with reference to the conspiracy count, I think.

Mr. Starkey: That's correct, your Honor.

The Court: All right. What did you say to him and what did he say to you at that time?

A. He asked me, since I was going down to South America, would I pick up a package of paint solids for him. And I agreed to do so.

And was anything else said at that time?

A. Well, he gave me a letter to give to people in South America. It was written in Spanish, and so the address was that of people in South America.

Q. Where in South America?

A. Chile.

Q. What city?

A. Valparaiso.

[fol. 298] Mr. Carluccio: Your Honor, what date is this that he is speaking about?

The Court: Did you give him a date?

Mr. Starkey: Your Honor, I believe the witness testified that it was between signing on on February 26th and the time of sailing on March 1st.

Q. Did he give you anything else besides the letter?

A. I believe it was part of a playing card. He said that he would send half the playing card down there and I should keep the other half.

Q. What were you to do with the other half?

A. I was supposed to present it to the fellow who had the paint solids.

Q. And you sailed on March 1st?

A. March 1st.

Q. What did you do when you arrived in Valparaiso?

A. Well, I still had this letter in my suit coat pocket and I practically forgot all about it, and so I was out in the streets for the first time I was in Valparaiso so I was looking over the town and I happened to run my hand in my coat pocket and I came up with this letter. So I caught a cab and went to this address.

Q. And what happened when you got there?

A. Well, I knocked on the door and a woman answered [fol 299] the door, and she asked me what did I want. So I presented her with the letter. And she asked me would I come in and I came in and she told me to sit down and then a fellow came out, and he looked at the letter and told me to wait. So I did so.

Q. What happened thereafter?

A. Well, about three-quarters of an hour or a half hour, within that period of time, he came back out with a package, and he gave me the package and said thank you. So I took the package and left.

Q. What did you do with the package?

A. Well, I stuck it in my coat pocket and went on around the city looking at the city, and then when I reached back to the ship I just took it and threw it in my locker.

Q. Now, on the way back to New York did there come a time when you received a letter?

A. Yes. Jesse wrote me a letter. I received it in Callao, Peru.

Q. Did you ever discuss that letter thereafter with Jesse?

A. No, I don't believe so.

Q. How do you know it was from Jesse? Did you recognize his handwriting?

A. Yes, I did.

[fol. 300] Q. Now, do you still have that letter?

A. No, sir, I don't.

Q. What did you do with it?

A. I imagine I destroyed it, threw it away, like I do most all my letters.

Q. Do you recall what he said in the letter?

A. Well, it was mostly small talk. In the letter he said that if anyone should ask what happened to the paint solids besides him to tell them that I misplaced it or I threw it away or lost it, or something like that.

Q. Now, do you recall when you arrived back in New York?

A. It was April 7th, I believe.

Q. Do you recall whether in the letter he mentioned anybody else?

A. He mentioned, I believe, a fellow by the name of Duke.

Q. What did he say about Duke?

A. He said if Duke should ask me what happened to the paint solids, to tell him that I lost it.

Q. Do you know who Duke it?

A. He was a friend of Jesse's, or is a friend of Jesse's.

Q. When did Jesse introduce you to him?

[fol. 301] A. I met Duke some time before I caught the ship.

Q. Do you recall what Jesse said when he introduced you to him?

A. No, I don't.

Q. Do you know Duke's real name to be Mitchell Anfield?

A. No, I don't.

Q. Do you see Duke in the courtroom?

(A pause)

A. No, I don't believe so.

Q. Do you want to get off the stand and come down and look?

(A pause).

A. I believe that is him over there.

Q. What kind of clothes is he wearing?

A. He is wearing a brown sport coat, I believe, a checkered sport coat.

Q. Will you go down next to the man and look at him, please?

A. I don't even see him. I don't remember him.

In the pink shirt.

Q. Will you return to the witness stand, please.

Mr. Starkey: Let the record show that the witness identified the defendant Anfield.

[fol. 302] A. It's been a long time since I saw him.

Q. Now when you returned to New York do you recall when you arrived?

A. It was April 7th, I believe.

Q. What happened when you arrived in New York?

A. When I arrived in New York Jesse and Duke meet me when I was coming off the ship. They were waiting outside the gate. So Jesse greeted me and they started talking. So he asked me what did I do with the package, the paint solids, and I then recalled the letter, and told him that I lost it.

Q. The paint solids?

A. The paint solids.

Q. What was said then?

A. Well, there was some discussion of how I lost it, or why did I lose it, or something like that.

Q. Who discussed it? Who said what?

A. Well, the discussion was between Duke and Jesse.

Q. And what was said to the best of your recollection?

A. Gee, it's been a long time. I can't exactly tell you exactly what was said.

Q. Did you have any conversation, you, yourself, with [fol. 303] Duke, or he with you?

A. Well, the conversation was mixed up between three.

Q. Do you recall anything Duke said to you?

A. No, not offhand.

Q. Where did you go from the pier?

A. We went uptown and went to a couple of bars and had a few drinks, and then they took me home.

Q. Was there any conversation before they dropped you off?

A. Well, there was conversation back and forth about different things, and about the paint solids also.

Q. Was there any more said about them?

A. Well, I don't exactly remember what was said but there was some discussion of it.

Q. Well, what did you do thereafter?

A. Well, I went home and Jesse asked me did he want me—did he want for me to pick him up, or did he want—let me get this straight. Did he want him to pick me up in the morning.

Q. To do what?

A. To take me back down to the ship.

Q. What did you say?

A. I agreed, yes.

[fol. 304] Q. Was there any further discussion with him about the package after Duke was gone?

A. No.

Q. Then the following morning did there come a time when he did pick you up?

A. Yes, he did.

Q. Was he alone?

A. No, he was with another fellow called Icky.

Q. Do you see Icky in the courtroom?

A. No, I don't remember him. I only saw him once.

Q. But you remember the name Icky?

A. Yes.

Q. What happened after Jesse and Icky picked you up?

A. They took me down to the pier, and I was a little late, so I wanted to go right in as soon as I possibly could, so they stopped to get some coffee, and it was at this little restaurant, so I went right in, and I was informed when I went aboard the ship that it was my day off, because it was a policy of Grace Line at the time that one man would get—half the crew would get a day off in each port, I meant home port.

So after I found out that I had the time off, I said, well, rather than have them come on the ship, pick up the package and talk and fool around on the ship, I would rather [fols. 305-538] get off the ship right there and then and go back home. So I picked up the package and walked out off the ship with it.

Q. And then what did you do with it?

A. Well, I walked out the gate with the package, and I handed it to Jesse.

Q. Was there any conversation at that time?

A. Yes, there was. He said I was a darn fool for bringing the package out. I asked him why. He said because I could have gotten myself in a lot of trouble. I said, "What kind of trouble. It's paint solids." He said, "You still shouldn't have took the package off. I didn't want you to bring it off." I told him, "Well, why is it you didn't want me to take the package off?" He says "Because it is narcotics," and I got pretty warm at him because I seen my seaman's going, my job and everything else.

Q. You got what at him?

A. I got pretty peeved, I got angry at him.

Q. Did you tell him so?

A. Absolutely.

Mr. Starkey: No further questions.

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[fols. 539-548] June 20, 1961, 19:30 a.m.

BARNEY L. FINK, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. Fink?

A. I am a commercial manager, local commercial manager for the New York Telephone Company.

Q. Local for what district and what area?

A. I handle several different exchanges and included is the Lorraine 2 exchange.

Q. And what are your duties?

A. Handling—well, complaints, orders, collections, and maintenance of records.

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[fol. 549] Q. I ask you to read from the documents to the jury the date of the telephone call, the point of origin, the point of destination, and the person who was called.

A. The call was originated on February 20, 1958. The

call was made from a coin telephone, RIV 9-9767, by a party representing himself to be Jesse Colson and he asked that the charges be made to LOrraine 2-8373. The call was sent to Valparaiso, Chile. The number called was 6085, and the particular person requested was—I believe it is Rene Huasaff. It looks like an "F".

Q. Will you read also from those records to the jury and the court, Mr. Fink, if the entry appears there, who the subscriber of that LOrraine number was at that [fols. 550-553] time?

A. Yes. Mr. Jesse Colson was the subscriber at that time.

. . . . . .

[fols. 554-578] June 20, 1961.

LEON ELLIS, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

. . . . . .

[fol. 579] Q. Did there come a time the following summer when you talked to Jesse on the telephone?

A. Yes.

Q. How closely can you fix the date?

A. It was either late May or early June. That is the closest I can fix it.

Q. And what was said on that occasion?

A. He asked me that he wanted to make a telephone call out of the country, and he wanted to know could I find somebody that he could use the phone because he couldn't use his and because he was tapped.

Mr. Carluccio: What year?

The Court: Tell us the year.

The Witness: '58. 1958.

The Court: And the date, as close as you can remember it?

[fol. 580] The Witness: It was either late May or early June.

The Court: All right, take the witness.

By Mr. Starkey:

Q. And what was it that he said?

A. That his telephone was tapped and he couldn't make any calls on it out of the country.

Q. And what did you do?

A. I asked my godmother about letting Jesse make a long-distance call on the telephone, and she said "Yes, okay," as long as they will pay the bill it would be all right.

And I said, "Okay."

So then I got Jesse the following day, the next day, or a couple of days later, and he made the telephone call to Chile.

Q. Did you hear any part of the conversation?

A. I heard it, but he was speaking in Spanish, so I didn't understand it.

Q. Did there come a time thereafter, when he talked to you, when he talked to you about a delivery?

A. Yes.

Q. When was that?

A. That was around the first or second week in [fol. 581] September.

Q. Where did the conversation take place?

A. We was either in his car or in Carter's Corner.

Q. That is a bar—Carter's Corner?

A. Yes.

Q. What did he say to you?

A. He told me that he was expecting a shipment in, and he wasn't going to call me no more until the date the people was going to arrive, and when I get the telephone, just tell him "Hello" and "How do you feel?" and hang up, and get a cab and come straight on up to his house.

Q. Was there any conversation about where the people would be coming from?

A. No. Well, I know where they was coming from. I know they was coming in from Chile.

Mr. Somers: Your Honor, I move to strike that out, sir.

The Court: How did you know that?

The Witness: Because from the telephone bill, that that is where he was calling the people.

The Court: How do you know that the telephone call to [fols. 582-604] Chile had any connection with the package?

The Witness: Well, he was telling me all the time that is what the call was for.

The Court: Colson was telling you that?

The Witness: Yes.

The Court: Overruled.

* * * * * * *

[fol. 605] Q. Did you have any conversation thereafter with Jesse Colson about the quality of the cocaine?

A. Yes.

Q. What was said?

[fols. 606-649] A. He told me that he was getting complaints by everybody that got the coke, and a lot of people was giving it back to him, and he said it wasn't nothing but garbage, you know. And he made a call to Chile, so he told me, and he told them to send him part of his money back or send him some more cocaine that is pure, because he is not going to lose all of his money on this deal.

* * * * * * *

[fol. 650] William John McNamara, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. McNamara?

A. United States Customs Enforcement Officer.

Q. How long have you been so employed?

A. 17 years.

Q. Were you on duty on May 6, 1958?

A. Yes.

Q. What was your assignment on that date?

A. On that day I was assigned to the after section part of the S/S Santa Maria with a partner, Edward Adams.

Q. And what was your assignment at that time? What were you supposed to be doing?

A. To be searching the ship.

Q. Did you do so?

[fol. 651] A. Yes, sir.

Q. What part of the ship did you search?

A. The aft peak.

Q. Did you find anything in the aft peak that was not part of the ship's equipment?

A. Yes. After moving some rope and some cargo nets I came across five packages.

Q. What was their appearance?

A. About three and a half inches by about eight inches, white packages, and they were partially covered by a blue cloth.

Mr. Starkey: I ask that these two items be marked for identification as Government's Exhibits 12 and 13.

(Government's Exhibits 12 and 13 marked for identification.)

Q. Now I show you Government's Exhibits 12 and 13 for identification, sir, and ask you if you recognize either or both.

A. Yes, sir, I recognize this one, sir.

Q. Where and when have you seen that before?

A. On the Santa Maria. It was partially covering these five packages.

[fols. 652-670] Q. Now, I show you the contents of this bag marked Government's Exhibit 8 for identification, and ask you if you recognize them.

A. Yes.

Q. Where and when have you seen them before?

A. On the Santa Maria.

Q. What were the circumstances?

A. Well, they were on—after I had moved this rope these were laying forward inside of the plastic bag and one was laying outside of it.

Q. Were they in the same condition that they are now?
A. No.
Q. How were they different?
A. Well, they had powder in them.

* * * * * * *

[fol. 671] EDWARD ADAMS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. Your occupation, sir?
A. Customs Enforcement Officer, sir.
Q. How long have you been so employed?
A. 15 years, sir.
Q. Were you on duty on May 6, 1958?
A. Yes, sir, I was.
Q. What was your assignment on that date?
A. I was assigned as a customs searcher, assigned to the Santa Maria on Pier 57, North River.
Q. With whom did you work on that date?
A. With Officer McNamara.
Q. Now, I show you, sir, Government's Exhibit 13 for identification, and ask you if you recognize that.
A. It looks like something I marked. Yes, sir, this is it.
[fol. 672] Q. Where and when have you seen it before?
A. On the date you mentioned, sir.
Q. May 6th?
A. That's right, sir.
Q. Where?
A. This cloth covered a package which I found back aft on the Santa Maria.
Q. I show you Government's Exhibit 10 for identification and ask you if you recognize that.

(No response.)

Q. You may take it out of the plastic case if you need to, sir.

A. Yes, sir, this is a part of that package, sir. This is my identification on there.

Q. A package which Government's Exhibit 13 for identification covered?

A. Yes, sir.

Q. Now, after you made this discovery, Mr. Adams, what you do?

A. I notified the inspector in charge.

Q. Who was that?

A. Inspector Levkulic.

Q. Did there come a time when you gave Government's [fols. 673-747] Exhibit 10 for identification to Inspector Levkulic?

A. Yes, sir, we left it there where we found it, and Inspector Levkulic came and picked it up and brought it back to headquarters aboard ship.

Q. And did there come a time—and was it in the same condition then as it is now, or did it have something in it?

A. There was contents of white powder in there, sir.

* * * * * * *

[fol. 748] JOSEPH DE VITO, called as a witness, having been first duly sworn, testified as follows:

* * * * * * *

[fol. 749] Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. De Vito?

A. Customs marine officer.

Q. What are your duties, sir?

A. I effect the formal entrance and clearance of vessels in the foreign trade.

Q. Are you familiar with ship manifests, and the method of keeping ship manifest records?

A. Yes.

Q. Is that part of your duties?

A. Yes, sir.

Q. I show you Government's Exhibit 23 for identification and ask if you recognize that document?

A. Yes, I do. This is the vessel's inward manifest.

Q. What vessel, and can you tell the jury—well, what vessel was covered?

A. This is the American steamship Santa Maria.

Q. It is the manifest for what voyage?

A. For the foreign voyage.

Q. When did it leave and when did it return?

A. Well, to leave I wouldn't know the exact date. This [fol. 750] is arrival. I haven't got that information with me but it can be available.

Q. What is the arrival date?

A. The arrival date is on May 7, 1958.

Q. Did it arrive May 7th or were those records cleared on May 7th?

A. She was entered, formally entered on May 7th. Her actual arrival off quarantine is 1:05 p.m. of May 6, 1958.

Q. Is that manifest kept in the regular course of the business of your office?

A. Yes, sir.

Q. And was it the regular course of business at or about the time of the arrival of this vessel on this particular voyage, to prepare and keep such a record?

A. Yes, sir.

Mr. Starkey: I will offer this *this* manifest, your Honor.

The Court: You might explain to counsel what the purpose of this is. You don't have to do it in front of the jury.

(Discussion off the record outside the hearing of the jury.)

Mr. Somers: No objection.

[fol. 751] (Government's Exhibit 23 for identification received in evidence.)

Mr. Starkey: I would like to ask the witness several further questions insofar as the contents of the record is concerned, your Honor.

By Mr. Starkey:

Q. Mr. De Vito, do you know what a vessel of the United States is?

A. Any vessel documented under the laws of the United States.

Q. The United States Registry?

A. The United States Registry.

Q. Does that manifest show whether or not this vessel, the Santa Maria, is of United States Registry?

A. Yes, sir, it does. It was registered at New York on January 5, 1950.

Q. Does that vessel show whether or not it was engaged in a foreign voyage at this time?

A. Yes, sir.

Q. Was it a foreign voyage?

A. It engages in foreign voyages.

Q. Do you see three pounds eight ounces 256 grains of cocaine or for that matter any amount of cocaine manifested or listed as part of the ship's stores?

[fol. 752] Mr. Somers: I will object to that, your Honor. This apparently is predicated upon an expectation of a negative answer. I strongly object to that, your Honor.

The Court: On what ground?

Mr. Somers: On the ground that this is improper, simply improper.

The Court: Why?

Mr. Somers: Because this man is putting—the examiner is putting into the mouth of the witness, by this indirection, testimony that he never could get in otherwise. He is going to say no. He might just as well say 27 pounds of narcotics, is that on the manifest. The man will say no. But look how inflammatory that is to a jury, your Honor.

The Court: Well, how do you suggest that is be handled, sir?

Mr. Somers: He shouldn't say it. What does appear on that manifest. Let him read it. The jury can deduce from that whether or not this contraband was ever on that manifest.

The Court: That manifest has possibly hundreds of articles.

Mr. Somers: Well, that's the only way to do it. [fol. 753] Certainly not like this.

The Court: That is overruled. Answer the question.

Did you study that manifest yourself, sir?

The Witness: Yes, sir.

The Court: Did you go through it all?

The Witness: Just now, no.

The Court: Did you ever go through it?

The Witness: Yes, I have.

The Court Did you go through it, after being instructed to look on the manifest and see whether or not there was any cocaine manifested?

The Witness: After being instructed, yes.

The Court: You did?

The Witness: Yes.

The Court: Did you go through the whole manifest, article by article?

The Witness: Not article by article.

The Court: Well, how did you go through it?

The Witness: Through the store list where it was originally supposed to be manifested. Ordinarily they don't manifest in the cargo section of any narcotics.

Mr. Starkey: I think your Honor by one or two questions I can clear the matter up.

[fol. 754] Q. Is there one list of ship's stores?

A. That's right.

Q. Is any cocaine listed on the ship's stores?

A. As far as I could see, none.

Q. Well, have you looked?

A. I have looked. I just glanced a few minutes ago down in there and there is none here. There is narcotics but no cocaine as far as I can see here.

Q. In the ship's stores there are some narcotics?

A. Some, yes.

Q. Among them is there any cocaine?

A. No.

Q. What are the narcotics?

A. Well, like morphine, morphine sulfur, and cocaine, but of course that is a medicine, more or less, but that is about all. As far as I know of narcotics, I don't know too much of narcotics.

Q. There is a listing there, is there not, giving the narcotics and the ship's stores?

A. That's right.

Q. There is no cocaine in that listing?

A. None. None listed.

Q. Now, will you look at the manifest and insofar as [fols. 755-1126] you have examined it there is no cocaine manifested?

A. Yes, sir.

Q. Have you looked at the discrepancy sheet? Do you know what a discrepancy sheet is?

A. Yes, sir.

Q. What is a discrepancy sheet?

A. A discrepancy sheet is stuff that is manifested but not found. That is stuff that is not manifest or manifest but not found. That is the discrepancy sheet. As articles that are noted on here that were not found or was manifested and not found.

Q. And will you read to the jury what was found but not manifested on this voyage, according to the discrepancy sheet.

A. Manifest but not found—

Q. No, found but not manifest, sir.

A. Found but not manifested. Well, according to this there is one box of engine parts, four cases of machinery, five packages of powder containing narcotics, and two packages of powder containing narcotics.

Mr. Starkey: No further questions.

* * * * * * *

[fol. 1127] FRANK TORRES, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. Do you know Jesse Colson, Mr. Torres?

A. Yes, I do.

Q. First, have you ever been convicted of a crime?

A. Yes.
Q. How many times?
A. Twice.
Q. When and for what crimes?
A. 1951 and 1952.

The Court: Keep your voice up, please.

A. 1951 on a marihuana charge, and in 1952 for possession of heroin.

Q. Now, I refer you to August of '57 and ask you if there came a time in that month when you saw Jesse Colson?

A. Yes. I took the ship Santa Maria in August '57. I met him in the company offices.

Q. Do you know what part of August it was?

A. In the doctor's office.

Q. What part of the month of August, do you recall?

[fol. 1128] A. August 27 or 28.

Q. And you saw him in the doctor's office?

A. Yes.

Q. Where was that?

A. That is in the Grace Line pier.

Q. Did you have a conversation with him?

A. Yes.

Q. What did he say and what did you say?

A. He said he was taking a trip off, that I should wait for him until he got back on because he had a connection of cocaine.

Q. Did he say where?

A. No, not at the time, no.

Q. What did you say?

A. I said I would wait until he got back on again.

Q. Was there any conversation about when that would be?

A. At the end of the trip.

Q. How long does a trip take?

A. 38 days.

Q. Do you know Winston Massiah?

A. Yes.

[fol. 1129] Q. Do you see him in the courtroom?

A. Yes.

Q. Will you point him out, please.
The Court: Tell us where he is sitting.

A. Right behind the DA on the right.

Mr. Starkey: May the record now show, your Honor, that he has identified the defendant Massiah?
The Court: All right, proceed.

Q. When did you first see Massiah?
A. On board the ship.
Q. On this voyage?
A. Yes.
Q. When did the ship get back?
A. October 8.
Q. Did there come a time thereafter when you saw Colson again?
A. Yes.
Q. Where?
A. When we got back from the trip on the ship.
Q. He came aboard the ship?
A. Yes, sir.
Q. Did you have a conversation with him?
A. Yes.
Q. What did he say and what did you say?
[fol. 1130] A. I told him I was getting off the ship.
He told me if I wanted to invest the money I had, give it to him so he could invest it for me.
Q. What did you say?
A. I told him no.
Q. Was there any further conversation?
A. Well, he told me that I should wait until the next trip when the ship got back, that he had a man bringing some stuff for him.
No, excuse me. He said to wait until he got back.
Q. Until he got back?
A. Until he got back and we could talk business then.
Q. What kind of business?
A. The cocaine business.
Q. Did you talk to anyone about this conversation with Jesse Colson?
A. Yes.
Q. Who was that?

A. A friend of mine.

Q. Did there come a time when you and that friend again saw Colson?

A. Yes.

[fol. 1131] Q. When was that?

A. The date I can't recall very well.

Mr. Carluccio: Your Honor, at this point could he kindly say the friend's name, the place, and he doesn't know the time, but if he has the friend's name and the place of this conversation, I would like to have it.

The Court: Suppose you tell us the friend's name and the place.

The Witness: Jimmy Torrens..

Q. Mr. Torres, I show you Government's Exhibit 21, the next to the last page, and I ask you to look at that and see if that refreshes your recollection as to when you next saw Jesse Colson.

Mr. Carluccio: Objection. Completely leading, your Honor. I don't think he could give him the information and tell him to pick out when he next saw Jesse Colson.

The Court: That is overruled. I think it is proper direct examination.

Let the record show that this exhibit shows the sailings of this witness on the Santa Maria.

Is that what it shows?

The Witness: Yes.

[fol. 1132] The Court: Is it your sailings or Colson's sailings?

The Witness. Colson's

The Court: All right. Yes.

The Witness: Yes, I see it. November 18.

Q. Of what year?

A. Of '57.

Q. Where did you see Colson on that day?

A. On the ship.

Q. Who was present?

A. Only me, only us.

Q. Who?

A. Colson and me.

Q. Where was Torrens?
A. He was in the messroom.
Q. Did you have a conversation with Colson?
A. Yes.
Q. What was said on this occasion?
A. That he had brought a load, that I should call him up that same night at his house.
Q. Did you see anybody else you knew aboard the ship at this time?
A. No.
Q. Did there come a time when you did go up to his house?
[fol. 1133] A. Yes.
Q. When was that?
A. The same day.
Q. With whom did you go up there?
A. Beg your pardon?
Q. With whom did you go there, with anyone?
A. With Torrens.
Q. You had a conversation with Colson at that time?
A. Yes.
Q. What was said on that occasion?
A. He had some samples which I tasted.
Q. Samples of what?
A. Cocaine.
Q. How did it taste?
A. Bitter.
Q. What was said?
A. He said it would cost us 500 cash and 600 if credit.
Q. 500 in cash and 600 if credit?
A. Yes.
Q. What did you say?
A. I told him I only had 300, and I would pay him the 300 later on.
[fol. 1134] Q. Did he make delivery at that time?
A. The day after.
Q. Do you know why he didn't make delivery at that time?
A. He didn't have it in his house, I guess.
Q. Where did he make delivery?
A. The day after.

Q. Where?
A. In my house.
Q. What did he give you?
A. An ounce.
Q. Is that scale weight?
A. No. 16 spoons.
Q. Are you familiar with the appearance of cocaine?
A. Yes.
Q. What does it look like?
A. Sugar or salt.
Q. And have you used cocaine?
A. Yes.
Q. On about how many occasions, would you say?
A. Quite a number of occasions.
Q. When did you begin?
[fol. 1135] A. About 1950.
Q. How did you use it when you used it, needle or snort?
A. Snort.
Q. Just snort?
A. Yes.
Q. You are familiar with the effect of cocaine upon you when you use it?
A. Yes.
Q. Did you use any of this? Did you use any of this delivery of Colson's?
A. Yes.
Q. Do you know whether or not it was cocaine?
A. It was.
Q. Now, did there come a time thereafter when you again talked to him about cocaine?
A. That was the end of December. No. I saw him again a week after that.
Q. What happened on that occasion?
A. I took a quarter of an ounce.
Q. Where?
A. In his house.
Q. How much did you pay for it?
A. $125.
[fol. 1136] Did you use any of that?
A. Yes.

Q. Do you know whether or not it was cocaine?
A. It was.
Q. Did you see Colson thereafter?
A. Yes. I saw him again but it was a week after I saw him and he had no more.
Q. What did he say?
A. He said he was waiting for another shipment that a friend of his was going to bring over.
Q. Now, did there come a time when you again met the Santa Maria?
A. Yes.
Q. When was that?
A. The end of the year. Late December.
Q. What happened? Did you go aboard?
A. Yes.
Q. What happened when you went aboard?
A. I was approached by Winston.
Q. Massiah?
A. Massiah.
Q. What was said?
A. He asked me how many pieces did I want. I told [fols. 1137-1228] him I didn't know what he was talking about.
Q. How many what?
A. How many ounces.
Q. Yes?
A. I told him I didn't know what he was talking about.

Then he said Colson had informed him what was going on between us.

* * * * * * *

[fol. 1229] June 23, 1961.

Cross-examination.

By Mr. Carluccio.

The Court: Did you tell the City, Federal or State agents, after your arrest in April 1958, about the landing of cocaine from the Santa Maria, and about the activity on the Santa Maria with reference to cocaine?

The Witness: Yes.
The Court: You told them all about that?
The Witness: Yes.
[fol. 1230] The Court: Whom did you tell, the City, State or Federal agents?
The Witness: The Federal agents.
The Court: You told the Federal agents about that?
The Witness: Yes.

By Mr. Carluccio:

Q. And you also told the City agents?
A. I don't recall.
Q. But you might have told the City agents?
A. I don't recall.
Q. You haven't been indicted or arrested—you haven't been indicted with reference to that importation on May 6th?

Mr. Starkey: Objection.
The Court: Well, the answer to that is he has not. So let's proceed. It is a matter of record.

Q. When you had told the Federal Agents about this importation on May 6 you had not only told them the ship, but you had also told them exactly where it would be found, is that so, on the ship?
A. More or less.
Q. Yes?
[fols. 1231-1262] A. More or less.
Q. Did you tell them it would be in the stern of the vessel placed under a tarpaulin?

Mr. Starkey: Your Honor, again I object. This is no way impeaches the witness' direct or cross, anything that he said on the stand.
The Court: That is overruled. Did you tell them it was to be found in the stern of the vessel underneath the tarpaulin?
The Witness: I think I did, yes.
The Court: All right, proceed.

. . . . . .

[fol. 1263] WARDNER H. BARTLETT, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Starkey:

Q. What is your occupation, sir?

A. I work for the Treasury Department, Bureau of Customs.

Q. What is your title?

A. Supervisory Customs Enforcement Officer.

Q. How long have you been so employed?

A. I have been in this title one year.

Q. What are your duties as a customs enforcement officer?

A. I am in charge of the searching of vessels.

Q. I show you Government's Exhibit 25 for identification and ask you if you recognize these documents.

A. These documents here include declarations. Each crew member makes out a declaration of his imports.

Q. Are you familiar with the appearance of such records?

A. Yes, sir.

[fol. 1264] Q. How long have you been dealing with them?

A. Ten years.

Q. Are you familiar with the procedure of the execution, preparation and maintenance of those records?

A. Yes, sir.

Q. Do you know if they are prepared in the regular course of the operations of customs?

A. They are, sir.

Q. Is it the regular course on or about the entry of a specific ship for such documents to be made and kept by customs?

A. It is. It is part of the entry.

Mr. Starkey: I offer these documents, your Honor.

The Court: Let counsel see them.

While they are looking at them go on to something else.

Q. Were you on duty on May 6, 1958?

A. Yes, sir.

Q. What was your assignment on that date?

A. I was assigned in charge of the search of the Santa Maria.

Q. Did there come a time later on that day when you took any packages into your custody?

[fol. 1265] A. Yes, sir.

Q. How many packages did you receive?

A. On the first occasion I received five packages.

Q. From whom did you receive them?

A. From Mr. McNamara.

Q. Now I show you Government's Exhibit 8 for identification and ask if you recognize the contents.

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Where and when have you seen them before?

A. On May 6 I saw them for the first time in the aft peak of the Santa Maria.

Q. Who called your attention to them?

A. Mr. McNamara.

Q. I show you Government's Exhibit 10 for identification and ask if you recognize those items?

A. Yes, sir, I do.

Q. Where and when have you seen that before?

A. I saw it on the same day, approximately 15 or 20 minutes after I saw the first packages.

Q. Was it Inspector Levkulic who gave you Government's Exhibit 10 for identification?

[fol. 1266] A. Yes, sir.

Q. Were these packages, Government's Exhibits 8 and 10 for identification in the same condition as they appear now in the courtroom or did they have something in them at the time?

A. They had a white powder in each one of the containers.

Q. Now I show you Government's Exhibits—I show you first of all Government's Exhibit 13 for identification and ask you if you recognize that cloth.

A. Yes, sir.

Q. Where and when have you seen that before?

A. I saw it on May 6, 1958. This cloth wrapped up—Adams' seizure.

Q. The packages which you were just shown?

A. Right. The last one. The two packages within one. The smallest of the two.

Mr. Carluccio: Will counsel mention the exhibit number of Adams' seizure?

Mr. Starkey: 11-A and B for identification.

Q. Government's Exhibit 13 for identification, was that in the same condition as you see it now?

A. Yes.

Q. Was it pulled apart, flat?

[fol. 1267] A. No.

Q. How was it?

A. It was wrapped around the packages, held by a piece of tape.

Q. How was it secured?

A. By a piece of tape, adhesive tape.

Mr. Starkey: I believe in regard to Adams' seizure this witness was only shown 10 for identification. 11-A and B are the contents.

Mr. Carluccio: For clarification of the record, is it that No. 13—it covered what exhibit?

Mr. Starkey: 10 for identification and 11-A and B.

Mr. Carluccio: That cloth, 13, covered 10, 11-A and 11-B, is that right?

Mr. Starkey: That's right.

Q. How was the rag secured?

A. By a piece of adhesive tape.

Q. Do you see the tape?

A. Yes, sir.

Q. Now, what did you do with the package which was secured with tape at that time after it was given to you?

A. When that was brought to my attention, I pulled [fol. 1268] the end of this cloth from the package and from the package I ripped a corner of it so that I could take a test of the contents.

Q. And did you take such a test?

A. I did, sir.

Q. What kind of a test was it?
A. We have a reagent, a marquis reagent.
Q. For what drug is that a test?
A. For opium or its derivatives.
Q. Including heroin?
A. Yes, sir.
Q. Do you know whether or not the marquis reagent reacts with cocaine?
A. It didn't sir.
Q. Do you know whether or not a marquis reagent does react with cocaine?
A. It will not with cocaine.
Q. So from that you learned that the contents were not heroin, is that right?
A. That's right, sir.

Mr. Starkey: May I have the Court's indulgence for one moment?
The Court: Yes.

(A pause.)

[fol. 1269] Q. Now, what did you do with the rag covering the blue rag which you have before you, Government's Exhibit 13 for identification?
A. That rag right there, sir?
Q. Yes.
A. What did I do?
Q. Well, at the point of the testimony you have reached it was still taped and secured.
A. Yes.
Q. What did you do then, did there come a time when you took it off?
A. There did, sir.
Q. Did you tear the tape at all when you took it off?
A. No, I just lifted the end of the tape. It wasn't ripped.
Q. Did there come a time——

Mr. Carluccio: I didn't hear that.

(Question and answer read.)

Q. And you took it off the package?
A. Yes, sir.

Q. Now, did you see any tax stamps on the package or on this at that time?

A. No, sir.

[fol. 1270] Q. Now I show you Government's Exhibit 12 for identification, and ask you if you recognize that rag.

A. I do, sir.

Q. Where and when have you seen that before?

A. I saw it on this same day, May 6, back aft, in the after peak, which partially covered Mr. McNamara's seizure.

Q. And those were the five packages?

A. Yes, sir.

Q. Which you have identified as Government's Exhibits 8 for identification?

A. Yes, sir.

Q. Did you take custody of that rag also?

A. I did, sir.

Q. Now, do you know whether or not these seizures were given numbers?

A. The seizure is given numbers.

Q. Do you know what the numbers were that were given to these seizures?

A. On these particular ones I don't know, but up in the upper right-hand corner on the tag on the seizure, the numbers come from the money and accounts division, they issue them.

[fols. 1271-1277] Q. Do you have any information with you?

A. I have some information with me.

Q. Will you check that?

A. If I may look at it, yes.

Q. You told me yesterday what the seizure number was, did you not, Inspector?

A. Right.

Mr. Pogoda: I didn't know the witness was on the stand yesterday.

Mr. Starkey: No. I am talking about in my office.

The Witness: McNamara's number was 22155. Adams' was 22156.

Q. All right, sir. Did there come a time, then, when you saw tax stamps on either Government's Exhibit 8 or Government's Exhibit 19 for identification, in these containers?

A. No, no tax stamps at all, sir.

Q. Did you see tax stamps on the outer covering, either rag, Government's Exhibits 13 and 12 for identification?

A. No, sir.

* * * * * * * *

[fols. 1278-1279] HELEN GARBUTT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Miss Garbutt?

A. I am a chemist at the Customs laboratory.

* * * * * * * *

[fol. 1280] Q. Now I show you Government's Exhibits 10 and 8 for identification and ask if you recognize those exhibits.

A. Yes. These appear to be the wrappings that were around samples of white powder that I received that day.

Q. Did you mark them in any way?

A. Yes, my initials are on here.

Q. And that goes for each package?

A. Yes. They are all initialled.

[fols. 1281-1301] Q. You received them from Officers McNamara and Adams?

A. Yes. I did.

Q. Now, were they in that condition or did they have anything in them at the time?

A. Yes. They had white powder in them.

Q. What did you do with the powder?

A. I took it out and weighed it, and analyzed it and found that it was cocaine hydrochloride.

Q. What was the weight?

A. The contents of this package weighed one pound, one ounce and 40 grains, and the total contents of these packages were two pounds seven ounces, 216 grains.

Q. For a total of approximately three pounds eight ounces and 156 grains?

A. Yes.

* * * * * * *

[fol. 1302] MARIO COZZI, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. Cozzi?

A. I am a customs agent employed by the Bureau of Customs, Treasury Department.

Q. How long have you been so employed?

A. As a customs agent, since 1953.

Q. Now, Agent Cozzi, were you on duty on May 6 of 1958?

A. Yes, sir.

Q. Did there come a time on that date when you boarded the S/S Santa Maria at Pier 57, North River?

A. Yes, sir.

Q. Where did you go after you boarded the ship?

[fol. 1303] A. I went up to the vicinity of a mess hall that was set up as a searching squad headquarters and met several customs officers there, and I also spoke to them about what went on aboard the ship.

Q. Now I show you Government's Exhibit 27 for identification and ask you if you recognize that item.

A. Yes, sir.

Q. Where and when had you seen it before?

A. I found that in a locker on board the S/S Santa Maria on the evening of May 6, 1958.

Q. Do you know whose locker it was?

A. Yes, sir. Winston Massiah, a seaman employed aboard that vessel.

Q. Did you have a conversation with Massiah about that tape?

A. Yes, sir.

Q. What did he say and what did you say?

A. After I found this tape I talked to Winston Massiah and I asked him if this was his tape. He stated that it was his tape.

I asked him what he used it for. He said—first I asked him where did he get it. He said he bought it in South America.

[fols. 1304-1308] And then I asked him "What did you use it for?" He said, "I sprained my left wrist."

Then I asked him, "Isn't it true that you used this to secure the packages of cocaine that were seized up here today?"

And he didn't make any reply to that last question.

* * * * * * *

[fols. 1309-1327] Cross-examination.

By Mr. Carluccio:

* * * * * * *

[fol. 1328] Q. I want to ask you about acknowledging that was his tape. That is the first question.

[fol. 1329] How did you show it to him when you said, "Is this your tape?" Did you show it to him just like that?

A. I showed him this thing, I says, "We found this in your locker. Is this your tape?"

He says, "Yes."

Q. And it was closed then, right, as you showed it to him?

A. I had it there for him.

Q. No. I am just asking you the question, did you show it the way you just showed it to the court?

A. I showed it to him closed and open before I left the vessel.

Q. The first time you showed it to him closed, right, as you just showed me now?

A. I showed it to him closed and open, sir.

Q. The first time?

(No response.)

Q. Or the first time you showed it closed?

A. I showed him the tape this way, because I was particularly interested in the width of this tape. I says, "Is this your tape?"

Q. That is the first time you showed it to him, the first time you showed it to him it was opened, is that your testimony, or was it the first——

[fols. 1330-1349] A. That is the best of my recollection, sir.

Q. And how long did you let him examine it?

A. I don't believe he took it in his hand. He looked at it and he says, "Yes, that is mine."

Q. Then what else did you ask him with reference to the tape?

A. I asked him where bought it. He said "I bought it in South America."

I said, "What did you buy it for?"

He said, "I sprained my left wrist." And he didn't have any tape on his left wrist.

I says, "If you sprained your left wrist how come you don't have any on?" So then I said, "What, are you kidding me? This is what you used to wrap the cocaine in."

Q. And he denied it?

A. He didn't answer.

* * * * * * * * *

[fol. 1350] FRANCIS R. LOGAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation?
A. I am a textile technologist.
Q. How long have you been so employed?
A. 30 years.
Q. Who is your employer?
A. The U.S. Customs Laboratories.
Q. What do your duties entail?
A. Analyzing various textiles that are imported and sent up by the examiners to be analyzed in order to aid them in putting the proper duty on said textiles.
Q. What is your educational background for this position, sir?
A. I have a B.S. Degree in textile engineering.
Q. From what school?
A. Clemson College, South Carolina.
[fol. 1351] Q. Now I show you Government's Exhibit 27 for identification—rather, Government's Exhibit 27 in evidence, and ask you if you recognize that roll of tape.
A. Yes.
Q. Where and when have you seen it before?
A. Well, it was brought to the laboratory on May 12 of 1958.
Q. That was by Agent Murphy?
A. By Agent Murphy, yes.

Mr. Carluccio: Your Honor, at this point I wish to question the United States Attorney, that he should bring out further qualifications of this gentleman to examine tape and examine for this purpose, his statement on that voir dire or the qualification was he examines and analyzes for the purpose of customs. I don't know if the analysis of the tape was proper.

The Court: Suppose we wait until we get the question and then proceed.

Mr. Carluccio: Surely.

Q. Incidentally, how many of these analyses do you make a month, on the average, Mr. Logan?

A. You mean——

Q. Analyses of textiles.

[fol. 1352] A. Oh, textiles.

Q. Yes.

A. I would say 40 or 50, maybe, a month.

Q. All right, sir, now I show you Government's Exhibit 13 and ask you if you recognize that cloth and the tape thereon.

A. Yes, I do.

Q. Where and when have you seen that before?

A. At the same time the role of tape was shown to me.

Q. And Agent Murphy also delivered that?

A. Yes.

Q. Now, after you received the roll of tape and the rag with the tape thereon, what did you do with them?

A. Well, the first thing we did was to take a piece of the tape, I believe—it doesn't make much difference—and we cut a piece from it, and we took a piece from the tape and treated them in the same manner.

The Court: Wait a minute, now. You took a piece of tape from the roll, is that right, and then a piece of tape from the blue cloth in front of you?

A. No, the attached tape, took it from the attached [fol. 1353] tape.

The Court: The tape that was attached to the cloth?

The Witness: Yes.

The Court: All right, sir.

Q. Did there come a time when you compared the end of the tape on the roll with the tape on the blue cloth?

A. Yes.

Q. When did you do that?

A. Well, in the course of looking it over and so on I noticed that it was——

The Court: Wait just a minute. Don't say what you noticed. You did make a comparison?

The Witness: Yes, we did.

The Court: All right.

Mr. Starkey: I ask that this document be marked for identification.

(Government's Exhibit 30 marked for identification.)

Q. I show you Government's Exhibit 30 for identification and ask you if you recognize that picture.

A. Yes, I do.

Q. Is that a fair representation of the condition of the [fol. 1354] tape on the roll and the tape on the cloth at the time of their delivery to you?

A. Yes.

Mr. Carluccio: Objection, your Honor. It is leading.

The Court: Overruled.

Mr. Starkey: I will offer Government's Exhibit 30 for identification in evidence.

Q. Had you made any cuts or any changes in the condition at the time this picture was taken?

A. Well, I had taken a cut out of the roll of tape.

Q. The square one in the middle?

A. Yes.

Q. Had you touched the end at all?

A. It wasn't anywhere near the end, yes.

Q. And that is all you had done?

A. Yes, on the roll, and I cut some out of the tape attached to the blue cloth, the blue rag.

Q. Well, where had you cut from the blue rag? Had it been from the edge which fits into——

Mr. Carluccio: Your Honor, I think he should refer to the exhibits. We won't have any record of "this".

[fol. 1355] The Court: Just a minute, please. Show the piece of tape that you didn't cut that is attached to the cloth.

The Witness: Here.

The Court: The one you have in your hand is the part that you didn't cut.

The Witness: Well, this was not too large a piece as I remember, so we cut a piece here.

Q. Was it a straight cut?

A. It wasn't cut with a die like this was. It was such a piece that we wanted to get a representative sample so I cut it with a razor blade to get it out of there and then trimmed it off with a pair of scissors.

Mr. Carluccio: For the record, Mr. Starkey, he is referring to a piece of tape stapled to the blue cloth Exhibit 13, and it's the smallest of the two pieces of tape.

The Court: That's right. Let's proceed.

Mr. Starkey: I offer Government's Exhibit 30 for identification in evidence.

The Court: Proceed with the examination.

Q. Now, did you measure the width of the tape on the cloth and on the roll?

[fol. 1356] A. Yes.

Q. What was the width?

A. Three inches.

Q. Of each?

A. Yes, the roll and the tape on the cloth.

Q. Did you make any further examinations or any further examinations besides measurement of the tape on each?

A. Yes.

Q. What examinations did you make?

A. With the piece—well, I will take the roll first, I took a piece there, and we cleaned it up, in other words, extracted with solvent and took the adhesive off of that leaving just the cloth, and then the cloth was analyzed.

We counted the number of warp threads per inch, and the filling picks per inch——

Q. And what were the numbers of each?

A. And then—well, I will finish by saying that then I took a piece from the tape that was stuck to the cloth and analyzed it also, cleaning up the adhesive, cleaning the adhesive off, and then taking the cotton cloth that was left and treating it the same way, counting the threads in the warp and the filling threads in the threads in the [fol. 1357] filling.

Q. And what were they? What were the numbers?

A. There were 82 threads per inch in the warp and—do you mind if I refer to my notes?

The Court: Go ahead.

A. 82 warp threads per inch, and 76 filling threads per inch, and then having taken those yarns apart it was then easy to figure the yarn size of these two different yarns.

Q. What were they?

A. The warp yarn size was 32 singles. That means a single yarn, not a two-ply. And the filling yarn size was 44 singles. In both cases the figures were the same. The tape from the roll and the tape from the cloth, that was stuck to the cloth.

And I might add that they both weighed three ounces per square yard.

Q. They weighed the same also?

A. The cloth would be three ounces per square yard.

Q. And this was true of both the tape on the role and the tape on the cloth?

A. Yes.

Q. Now, after this examination did you reach any con- [fol. 1358] clusion as to whether or not the tape on the cloth was off the role?

Mr. Carluccio: Objection, your Honor. I don't believe that he has been properly qualified as an expert on the matching of tape. Again——

The Court: You may examine him on the voir dire. The Court will accept him unless you can show that he is not qualified. Apparently he is qualified.

By Mr. Carluccio:

Q. Sir, Mr. Logan, during the regular course of your business and work with the government your analysis is mainly for the purpose of determining duty on specific items?

A. Yes, I would say so.

Q. And how often do you have to make an examination to determine whether one piece of tape or one piece of tape came off a specific roll?

A. Well, we never have that.

Q. You never did that before until this time?

A. No.

Q. You mean this is the first time that you ever had to

determine whether a piece of specific cloth or tape came off another piece of specific cloth or tape?

[fol. 1359] A. No, not adhesive tape but we have had cloths that had heavy sizing and various substances on them that we had to clean off before we could get down to the base of the cloth so it is something similar to that, but I never had tape, I never had adhesive tape before.

Q. With cloth rather than adhesive tape how many times did you so analyze pieces for specific——

A. I didn't hear that question.

Q. You said it other times, you had to make analyses other times not for tape but for cloth. How many times?

A. Oh, that is quite frequently. The use of resins and the various finishes they put on cloths now is quite——

Q. To match up one piece with another?

A. Oh, no, not that.

Q. How many times would you have to match up one piece of cloth with another specific piece of cloth?

A. About the only thing that would come into that would be the analysis as I pointed out, about putting the threads per inch, ounces per square yard, and in that way you analyze two samples a lot of times and they match up [fol. 1360] in that respect.

Q. But other than this time, today, you never had to match up one specific cloth or tape with another specific cloth or tape and give an opinion as to whether they came from the same bolt or the same roll?

A. No, I think not.

Mr. Carluccio: I move that his testimony be stricken because he is not qualified. He never did it before in his life, your Honor.

The Court: Is it your testimony that you never examined a piece of cloth as against another piece of cloth to see whether or not the two pieces of cloth came from the same bolt or the same supply?

A. No, we wouldn't get a request like that.

The Court: What type thing do you do, sir?

A. Well, the examiner that handles various textiles sends them up to us to be analyzed, and the main thing that they want in a cotton cloth, as this turned out to be

the base cloth, is that average yarn size and the same length, and if it's a cloth how it is woven. And we give him the answer, and then he can determine the rate of duty. But I don't think I have ever had to compare, as in this case, a piece of cloth with another piece of cloth for customs purposes.

[fol. 1361] The Court: Well, has it ever been your business to reach conclusions as to whether or not one piece of cloth are the same?

The Witness: That just doesn't come up at all.

The Court: You don't do this?

The Witness: No.

The Court: As I understand it, what you do do, though, is you take a piece of cloth and you examine it to see how many threads in the warp and how many threads in the woof, and then you see what kind of a yarn it is and so on?

The Witness: Yes, you determine the average yarn size and that is the way the duty is put on.

The Court: As I understand your testimony, you took the adhesive off of the cloth part of the tape.

The Witness: Chemically, yes.

The Court: That was a sample that was taken from can and the sample of tape that was taken from the blue cloth, and you counted——

The Witness: The sample of tape taken from the blue cloth.

Q. Yes, and you counted the threads in each and you [fol. 1362] weighed the yarns in each?

A. Yes. We had to weigh the separate yarns in order to get the yarn size.

The Court: And my understanding of your testimony is that you found the number of threads both ways were the same in each.

The Witness: That's right.

The Court: And the weight of the yarn is the same?

The Witness: The weight of the cloth was the same.

The Court: Is that your testimony?

The Witness: Yes.

The Court: And that is all it is, I guess.

The Witness: Yes.
The Court: All right.

By Mr. Starkey:

Q. And the width was the same?
A. Yes.

The Court: Yes.

Q. Now I show you Government's Exhibit 30 for identification——

Mr. Carluccio: Your Honor, have you ruled on the admissibility of this yet?

[fol. 1363] Mr. Starkey: It is still for identification.

The Court: I haven't ruled on it yet.

Q. And I ask you with specific reference to these edges which I am pointing out, did you tamper with those in any way?
A. No, sir.

Mr. Carluccio: What is he pointing to?

A. Do you mean the cuts?
Q. I will ask that question again. With reference to these jagged edges to which I am pointing, did you tamper with those in any way?
A. Oh, no.

Mr. Pogoda: If the Court please, I object to the form of the question. I think the witness should be asked not what he did not do, but what he did and ask whether he did that.

The Court: To get to the point, get the end of the tape from the can and get the end of the tape from the bluedemin cloth and see if they match. Let's get it over with. We will fool around with it for an hour.

Mr. Starkey: All right, your Honor.

The Court: Don't do that with him. Anybody can see if it matches. You don't have to be a genius to do [fol. 1364] that.

Mr. Starkey: I think the picture will facilitate the examination and I would like to have the witness testify,

which he has done, that as far as the points with which we are concerned in this photograph, he didn't touch those in getting his samples.

The Witness: Certainly not.

The Court: Haven't you got the two exhibits right there before you?

Mr. Starkey: I do, your Honor.

The Court: Why don't you put them together and see if they match.

Mr. Starkey: All right, your Honor.

The Court: Put it there on the jury rail.

Mr. Pogoda: May I at this time object to Mr. Starkey exhibiting the photograph in the presence of the jury when it is not in evidence.

The Court: I don't think he was exhibiting it, sir, and let the record show that he wasn't exhibiting it.

The Witness: It's kind of dried up now.

Mr. Carluccio: Let the record show that——

Mr. Starkey: Your Honor, I object to the comments of counsel.

[fols. 1365-1384] Mr. Carluccio: Your Honor, he is showing something to the jury and I would like the record to show that that there is nothing on the record to show what he is matching up, your Honor. I just wanted to say let the record show that counsel is trying to match up the end of the tape which is in one exhibit in evidence with the larger piece of tape which is on Exhibit 13 and that was what counsel did.

The Court: All right, sir.

Mr. Carluccio: And now let the record show that counsel is making up the end of the tape on the roll with the smallest piece of tape that is on 13.

* * * * * * *

[fol. 1385] June 26, 1961.

FINBARR J. MURPHY, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, sir?

A. I am a customs agent with the Treasury Department, Bureau of Customs.

Q. How long have you been so employed?

A. Approximately four years.

Q. Are you the agent in charge of the investigation of this case?

A. I am.

Q. Were you on duty on May 6th of 1958?

A. I was.

Q. Did there come a time on that date when you boarded a Grace Line vessel by the name of the Santa Maria?

A. Yes, sir, at approximately 2.30 p.m. on May 6, 1958.

Q. Will you tell the Court and jury what you did and [fol. 1386] what you observed thereafter?

Mr. Carluccio: Objection, your Honor. If it is to be in narrative form, I don't think it is proper at this time. I think it should be in question-and-answer form.

The Court: I will overrule the objection. It might be quicker this way.

A. On May 6th, at that approximate time, 2.30, I boarded the Santa Maria, and I went to the room of the defendant Massiah. At that particular time I was accompanied by, I believe, two customs searchers. During this time we conducted a search of the defendant Massiah's quarters, bunk and his person. We looked for the false bottom of lockers; we searched under the locker, and there was a false bottom under the locker, took out some screws. I was watching the searchers go through the shelves in his locker, and——

Mr. Carluccio: Did he say there was or there was not a false bottom? I didn't get that.

The Witness: There was.

Mr. Carluccio. There was?

The Witness: Yes. All these lockers have false bottoms. They are built about four inches off the ground.

Q. I show you Government's Exhibit 27 and ask you [fol. 1387] if you recognize that roll of tape.

A. Yes; I do.

Q. When did you first see that roll of tape?

A. I first saw this roll of tape approximately 3 o'clock. I observed it in the locker of the defendant Massiah. During the search I personally opened that myself, as there is a compartment within that tape, and I observed its ragged edge, and at that particular time it didn't mean anything to me, so I put it back, and I instructed the searchers to continue their work.

Q. What happened thereafter?

A. Oh, approximately 3.30 I was informed that a seizure had been made, and it was apparently cocaine.

Mr. Pogoda: I move to strike out what he was informed as to what it was, as being purely hearsay.

The Court: I grant your motion and instruct the jury to disregard the witness' statement as to what he thought it was.

Q. Did there come a time at about 3.30 when you had a conversation with some other customs officers?

A. Yes.

Q. What did you do after that conversation?

A. After that conversation I was interviewing the defendant Massiah in the headquarters established aboard [fol. 1388] the ship.

Q. Who else was present at that time?

A. I believe it was Agent McVeigh and myself.

Q. Did there come a time when Agent Cozzi interviewed the defendant in your presence?

A. Yes.

Q. When did that take place and where?

A. That took place approximately 7.30, I believe.

Q. Will you state what was said at that time by Agent Cozzi and the defendant.

A. Agent Cozzi came into the room with this roll of tape here, and he asked the defendant Massiah, did he

own the tape, to which defendant Massiah stated that he did and that he had bought it in a South American port.

I, too, asked him, and he told me he had bought it in Callao. He stated that he had hurt his left arm, and it was for that reason that he had the tape.

Q. Now, did there come a time thereafter when you placed the defendant Massiah under arrest?

A. Yes. Soon after his stating that he owned the tape, he was placed under arrest.

Mr. Starkey: I ask that this document be marked for identification as Government's Exhibit 32.

(Marked Government's Exhibit 32 for identification.)

[fol. 1389] Q. I show you Government's Exhibit 32 for identification and ask you if you recognize that document.

A. Yes. This is a——

The Court: Wait. You do recognize it.

The Witness: Yes, sir.

Q. Where and when have you seen it before, and when did you first see it?

A. I came into possession of this document here—it is a National Maritime Union membership book.

Mr. Pogoda: I will object to the witness reading from anything that is not in evidence.

The Court: Don't read from it. Just answer, when did you come into possession of it and how?

A. (Continuing) On May 6, 1958, I took this from the person of the defendant Massiah.

Q. At the time of his arrest?

A. That is correct.

Mr. Starkey: I offer Government's Exhibit 32 for identification in evidence.

Mr. Carluccio: For the enclosures that are in there now in the union book when you got it?

The Witness: I believe so.

Mr. Carluccio: Well, do you know?

The Witness: Well, that book has been in the custody of the United States attorney here, and that is just the

[fol. 1390-1393] way I brought it over, and I would state that it was.

Mr. Carluccio: With all these enclosures?

The Witness: Yes.

Mr. Carluccio: And the photograph?

The Witness: I believe so.

Mr. Carluccio: No objection.

(Government's Exhibit 32 for identification received in evidence.)

By Mr. Starkey:

Q. Agent Murphy, I will ask you to read to the jury from Exhibit 32 the matter contained therein relating to one Renie.

A. On page 13 of this document there is a notation in green ink spelled "Renie", and the number is 6085.

Q. I ask you also to read the telephone number on Government's Exhibit 1, the telephone toll slip on Jesse Colson's telephone.

A. This document shows "Valparaiso, Chile, 6085, Renie Huasaff."

* * * * * * *

[fol. 1394] Q. Do you know where the declaration of the defendant Winston Massiah, also a crewman on this ship, is at this time?

A. No; I don't

Q. Have you ever had it in your possession?

A. I have had it in my possession, yes.

Q. And what did you do with it?

A. It came into my possession. I ordered it from the record center at the time Elita Lloyd came to me with a note from Winston Massiah, a "To whom it may concern" note, requesting that I turn over some personal effects and some articles that were supposed to be declared. That is the time I had it in my possession. And Agent Cozzi was with me, and he filled in the required form, the required cashier form, for duty purposes. And Elita Lloyd received defendant Massiah's personal effects and paid duty in the amount of $7.09, I believe. We had

to have that dec to make notations as to what he declared.

Q. All right. What happened to it after that?

A. I believe I sent it back to the record center again, as I had no more use for it. What happened to it after that I don't know.

[fols. 1395-1397] Q. Do you know whether or not the document is still charged to you as a record?

A. Yes. I am informed that it is charged to me as a record.

Q. So that you are on record as charged with the document, but you do not know where it is?

A. I do not know where it is. I called for that record, and it was sent up. That is the way they usually charge it.

Q. Did you throw the document away to spoil evidence?

A. No.

Q. Did you destroy it?

A. I did not.

Q. As far as you know, it has merely been misplaced?

A. That is what I believe. It is misplaced someplace.

Q. Now, you say you did see the document?

A. I definitely did, yes.

Q. Was there any cocaine manifested or declared on that document?

A. No; there was not.

* * * * * * *

[fol. 1398] A. Agent Murphy, did there come a time when you saw the defendant Massiah and the defendant Colson together?

A. Yes; there did.

Q. When was that, sir?

A. That was on November 19th, 1959.

Q. And where did this meeting occur?

A. The meeting occurred on West 146th Street, between Seventh and Eighth avenues at approximately 9.30 p.m. in the evening.

Q. And were they on the street?

A. No. This meeting took place in a car operated by Jesse Colson in 1958—a 1958 Chrysler Imperial.

Q. Were you able to overhear what was said?

A. Yes; I was.

Q. By what means?

A. Prior to this meeting, with the agreement of Jesse Colson, I had placed a Schmidt portable transmitter under the front seat of that vehicle. This device enabled me to pick up the conversation as I am sitting in another [fol. 1399] car.

Q. Will you tell the jury what you heard Colson and what you heard Massiah say at this time.

Mr. Carluccio: Your Honor, I seriously object to this evidence and feel that it is illegally and improperly obtained and constitutes a violation of the constitutional rights of my client. It comes under the category of eavesdropping, tape recording, wiretapping. Also I submit that, being that it was placed under the seat, the back seat, as he states, and I believe at the request of the government, with the cooperation of Jesse Colson——

May I ask this question:

Did Jesse Colson cooperate in helping you to place this transmitter behind the seat of the car, Mr. Murphy?

The Witness: Yes; he did.

Mr. Carluccio: —with his cooperation, wherein Jesse Colson was acting as an agent for the government, that this also constitutes entrapment, and this evidence is illegal and inadmissible, and it should not be admitted at any time in this trial.

Mr. Pogoda: I further object that unless this witness can testify he observed the two of them and only the two [fol. 1400] of them in the automobile, the conversation cannot be identifiable unless this witness is prepared to swear that he knows the voices of both people and knew the voices of both people at the time the alleged recording or transmitting or transmission was made.

The Court: Are you prepared to have the witness testify that he recognized the voices?

Mr. Starkey: Yes, your Honor. He previously testified that he talked to Massiah on May 6.

By Mr. Starkey:

Q. Did you recognize his voice on this occasion in November?

Mr. Pogoda: If the Court please, the conversation with Massiah was on May 6th of 1958. There was one conversation. And here we have a conversation on November 19, 1959, a year and a half later. I submit that the one conversation is insufficient as the basis for the recognition of a transmitted telephone voice, and I object to any such response to the question asked by Mr. Starkey.

The Court: Is that the only time you heard the voice of Massiah prior to this recording?

The Witness: No.

[fol. 1401] The Court: This really was not a recording, was it?

The Witness: No. It was transmitted through the air.

The Court: It was a transmission?

The Witness: Yes.

The Court: Received simultaneously by you by radio, I guess?

The Witness: I have earphones to pick it up.

A. (Continuing) Subsequent to the arrest of Massiah, I believe I spoke to him in the Federal House of Detention.

Q. Have you spoken to Massiah since then?

A. Yes. I have spoken to Massiah in your office, in November of 1960. I spoke to Massiah—I had a conversation with him in the office of Callandra, I believe, when he came up to look at these particular exhibits here.

Q. Do you have any doubt that the voice you heard over the Schmidt device was Massiah's voice?

A. No doubt at all, my reasons being that I had been speaking with Jesse Colson.

The Court: Wait just a minute, please.

The question before the Court now is whether or not you recognized this voice, which was coming over, as the [fol. 1402] voice of Massiah. We are not interested in what anybody told you about it. We are interested in finding out whether or not you recognized Massiah's voice.

The Witness: Yes. I recognized it.

Q. Could you also view the conversation as it took place?
A. I could.

The Court: You were looking at these people at the same time?

The Witness: Oh, yes, sure.

The Court: You were looking——

The Witness: I had them under observation visually and electronically.

The Court: I see. And you could see that there were only two people in the car?

The Witness: There were only two people: the driver and the defendant Massiah.

The Court: And you were familiar with Colson's voice?

The Witness: Oh, yes, quite familiar.

The Court: You had been talking to him daily for weeks, I assume?

The Witness: Months would be more like it.

The Court: Months?

The Witness: Yes.

[fol. 1403] The Court: And did you recognize Massiah in the car physically by seeing him?

The Witness: I recognized him just opening the door, and when he got inside I recognized him also.

The Court: In other words, you recognized him as the defendant, and as the other person in the conversation with Colson?

The Witness: I did, sir.

The Court: What was the date of this conversation?

The Witness: November 19, 1959.

The Court: And this was after Colson's arrest?

The Witness: Yes. Colson was arrested in July, 1959.

Mr. Carluccio: Your Honor, if the Court please, I also wish to make known to the Court one other reason for my objection, and that is the best evidence rule. I feel that if this is a conversation between Colson and Massiah, and Colson was present at the conversation, that Colson should be brought in to testify as to what was said and how it was said.

Mr. Starkey: Your Honor, I object to——

The Court: Wait a minute.

Mr. Carluccio: The reason being twofold: Colson is [fol. 1404] available for testimony——

Mr. Starkey: I cannot let this go any further, your Honor. This is gross misrepresentation on the part of the attorney.

The Court: The jury will disregard what counsel on either side will say here as to the availability of Colson. The jury is not informed as to the availability of Colson.

Mr. Carluccio: When we find that he is alive—not that he has passed away—however, that Colson can testify as to what was said, and I make also the analogy with the tape that we had introduced with the rag: it is not a photograph of the tape, so likewise, the best evidence in this instance is the conversation as Colson heard it from Massiah, in addition to which, as your Honor well knows, the reason for this conversation, most probably, was to pump the defendant for admissions, and if they are admissions against my client's interest, it has always been a rule of law that admissions may be explained, the full circumstances around the admissions and how the statements were made.

In this respect I can't cross-examine an inanimate tape recording, because all Mr. Murphy will be stating in his examination by Mr. Starkey will be the inanimate words [fol. 1405] of what he heard on this machine, this tape recording.

If Colson is here to testify, we can find out not only what was said, your Honor, but how it was said, the demeanor of the parties, where it was said in a jocular fashion, whether it was said in a serious fashion, and the like. And I feel that if counsel wishes to bring out admissions, they should be brought by the best evidence, Mr. Colson, who was there, not a hearer of an inanimate recording, so that our right of cross-examination is not curtailed.

The Court: That is overruled. The Court is going to admit the language as far as possible as to what Massiah said, not what Colson said. In other words, I don't want you to give what Colson said at all. I just want you to give what you heard, as the words came from Massiah's mouth.

The jury is also instructed that this evidence is binding only on the defendant Massiah. This evidence is not to be construed in any way with reference to the guilt or

innocence of the other defendants on trial. This is evidence only as to the defendant Massiah.

All right. You may proceed.

Mr. Starkey: In regard to the application of the de-
[fol. 1406] fense just now, I would merely like to state for the record that I have submitted to the Court and defense counsel the government's memorandum of law citing On Lee, in which the Supreme Court ruled on this precise question.

The Court: All right.

By Mr. Starkey:

Q. What was said by Massiah during the course of this conversation?

A. Massiah stated——

The Court: Wait just a minute, please.

Delete from what Massiah said anything about anybody else participating except Massiah. Do you follow me?

The Witness: Yes.

The Court: In other words, don't give us anything about anybody but Massiah, since this is only binding on Massiah. Omit from your testimony anything with respect to any other person, including the defendants in this case.

Mr. Pogoda: If the Court please, if there is a typewritten transcript of the conversation, I think the defense should have the opportunity to examine it.

The Court: Yes.

[fol. 1407] Q. Now, will you proceed, Agent Murphy.

A. The defendant Massiah stated that during this time he had made a million mistakes and that instead of fighting each other, they should be fighting hard to win this case. He stated that while in Valparaiso, Chile, at the home of Renc Huasaff, he sat down and wrote a letter to New York stating the exact amount of cocaine he was bringing in, the exact amount that Rene Huasaff expected of him. He said this letter was written in the presence of Rene and his wife. He stated that he had the cocaine in his room in a suitcase for approximately 22 days, and that two days out of New York he noticed the cocaine was evaporating. He got the roll of tape and attempted to make it airtight so that there would be

no further evaporation. And he stated that it was this tape that got him in all this trouble.

Q. Do you recall any further conversation?

A. Yes. He stated that on arrival he met a longshoreman and that he motioned him through the passageway to show him where the cocaine was sitting, and that while walking through the passageway he saw two big men following him. He states that, "Jesus Christ, they must have been bulls"—the exact words. To that he said, "I told the longshoreman to come back later, it was too hot." [fol. 1408] He stated that he intended to give the longshoreman all the cocaine at that time.

Q. Do you recall anything about the informer?

A. He stated that the informer—it's a bit difficult to get this across. He stated that he knew who the informer was in this case, and that he thought that besides the informer there were other people involved. He stated that, "If they knew so much about my meeting Rene in his truck in Valparaiso," that the Feds must have been watching him a lot longer than what they had anticipated.

Q. Can you recall the exact words about the informer? Were any names mentioned?

A. Yes. The informer was named as Frank Torres.

Q. Was anything else said? What was said, Agent Murphy? Were any other possibilities discussed?

A. Yes. The defendant Massiah stated that he was not stealing from the packages as they were coming in in the past, and he could not see how anybody could accuse him of stealing from any of the packages, because it was not in his makeup to steal, and if he did, he would be afraid of revenge on the part of his fellow-conspirators.

Mr. Carluccio: Objection, your Honor, especially as to [fol. 1409] the last part.

Mr. Starkey: The government consents to strike out "conspirators".

Mr. Carluccio: "fellow-conspirators"—that whole phrase.

The Court: The motion of counsel to strike is granted, and the jury is instructed to disregard that part of the testimony.

Q. Was May, the chemist, mentioned?

A. Yes. The defendant Massiah stated that besides Frank Torres, he had just remembered that the biggest informer of all—the exact words—the biggest stool pigeon of all was a woman he identified as May, a federal stool pigeon, and it could have been May, because he had some dealings with May. And besides the information they probably got together, the Torres information, "and that's how I was fingered."

Q. And you said a chemist was mentioned?

A. Yes. Massiah stated that at one time, while in Valparaiso, he remembered Rene introducing him to a chemist by the name—he didn't mention his name—he said a chemist with a gimpy leg, and he thought perhaps it was also the chemist who could have put the finger on him besides Torres.

[fol. 1410] Q. Did he say why he thought this?

A. Yes. He stated that during the transaction this man stood right there, and he was present while the transaction was going on in the past. And he had personal knowledge of just what was transpiring.

Q. Was anything said about a misapprehension by Colson?

A. Yes. Massiah stated that Rene questioned him as to who was going to get the load.

Massiah stated that Colson was to get the load, that he was going to handle all the distribution of it.

Then Colson—Massiah stated that, "I told Rene it was all for you and that I have no intention of stealing anything."

Q. Did there come a time when you saw Colson and the defendant Anfield together?

A. Yes; there did.

Q. And when was that?

A. This was on December 5, 1959, approximately 9:30, 9:45, in the southeast corner of Lenox Avenue at 118th Street.

Q. Did you see whether or not they conversed?

A. Yes.

Q. Where did the conversation take place?

[fols. 1411-1417] A. The conversation took place in a 1958

Chrysler Imperial driven by Jesse Colson. The defendant entered into the car and entered into a conversation with Colson.

. . . . . .

[fols. 1418-1435] Mr. Pogoda: If the Court please, I respectfully press my objection. An improper foundation has been laid for a conversation between the defendant Anfield and Colson, to which the witness is about to testify.

The Court: That is overruled. The jury is instructed again that this testimony which will be given is binding only on the defendant Anfield. It is not binding on anyone else other than Anfield, since it is his own statement.

Further than that, the witness is instructed to give the testimony without reference to any of the other defendants on trial. I am not assuming that there was any reference in these conversations to any other defendants, but in the event thaf there is, you should eliminate that from your statement.

. . . . . .

[fol. 1436-1437] Direct examination continued.

By Mr. Starkey:

Q. Insofar as the conversations between Colson and Anfield and Colson and Massiah in the automobiles were concerned, do you know whether or not there were any other devices present besides the microphone over which you heard the conversation?

A. Yes; there was.

Q. And what was it or what were they?

A. It was a Minifon tape recorder that I had placed in the glove compartment of Jesse Colson's car, and we taped the conversation.

. . . . . .

[fols. 1438-1446] Mr. Carluccio: I object, your Honor. There is a great deal of objectionable material in the tapes by virtue of the fact that you directed Mr. Murphy's testimony only to evidence that was concerned with the par-

ticular defendant, and in addition there is not only that, as I can see from two of the records there are privileged matters; there are many other matters in there.

The Court: I sustain the objection. Proceed. It is your witness now. You may cross-examine.

Cross-examination.

By Mr. Carluccio:

* * * * * * *

[fol. 1447] Q. Mr. Murphy, were you present when Mr. Cozzi put handcuffs on himself on the Santa Maria?

A. Yes.

Q. Can you tell us what you recall with reference to [fols. 1448-1449] Mr. Cozzi putting handcuffs on himself?

Mr. Starkey: I will object to the form of that question and also to the line of questioning.

Mr. Carluccio: Your Honor, I would like to know what happened and what he saw and what was said at that time.

The Court: I overrule the objection.

Suppose you just give us what you know about this incident, please.

A. Yes. Cozzi put the handcuffs on himself for the particular purpose—we were trying to effect a delivery of the cocaine, and we wanted Massiah's cooperation. I observed Jesse Colson out in the '58 Chrysler, waiting outside the pier.

* * * * * * *

[fols. 1450-1453] Cross-examination.

By Mr. Pogoda:

Q. Now, Agent Murphy, when were you originally assigned to this case?

A. In April, the end of April.

Q. Did you have occasion to speak to Frank Torres?

A. Yes.

Q. And the information you received from him was that

there was a shipment of cocaine coming in on the Santa Maria; isn't that so?

A. In part, yes.

• • • • • • •

[fol. 1454] Q. You knew, or at least you had information that stuff was being brought in and that Massiah was the one who was bringing it in; is not that true?

A. That's correct.

Q. And at any time did you allow yourself an opportunity to apprehend or seize Massiah with this stuff?

Mr. Starkey: I submit counsel just ignores the Court's ruling. This is almost the same question to which an objection was sustained.

Mr. Pogoda: In one I asked for an opinion.

The Court: It might be quicker if we just let him answer the question.

Why did you go about it this way instead of waiting until Massiah or somebody picked it up and brought it off the ship?

The Witness: We had a conference on that down in Stone Street as to the best way of handling it. You have to be familiar with the pier to realize that when longshoremen go on these ships, and with passengers coming off, crewmen are running around, it's pretty hard to control the situation. So we figured it was best to sort of bottle [fols. 1455-1456] up Winston Massiah rather than taking a chance of observing him from any vantage point where you might miss the switch from the longshoremen to Winston Massiah, and rather than taking the change of having the cocaine enter into distribution here in the City, we decided to work this way: bottle up Massiah, because our information was that he would lead the longshoreman to the area, and that way the longshoreman couldn't get to the spot where the cocaine was until he had clearance from Winston Massiah. That was the reason for this.

Q. You knew that the stuff would be concealed in the afterpeak of the ship?

A. Or in the bottom of the locker or in the afterpeak of the ship, right.

Q. That is right. Behind some rope. You knew that?
A. That's right.

. . . . . .

[fol. 1457] Q. Did you speak to Frank Torres?
A. Yes. I was in touch with Torres.
Q. He was your sole source of information; is not that true?
A. He was, and the Police Department had the same thing on this matter.
Q. On which matter?
A. Involving Massiah.
Q. You mean, the New York City Police Department had information concerning this shipment on the Santa Maria?
[fols. 1458-1463] A. Yes. They had pretty near the same stuff we had.

. . . . . .

[fol. 1464] The Court: All right, sir. I will overrule the objection. However, if you are going to get into conversations with Colson, I suggest to you that you may get into evidence something that you might not want in evidence.
Mr. Pogoda: I am not asking for the substance of the conversations. I am merely asking how many conversations there were.
The Court: Overruled.
(To the witness) How many conversations were there, about?
The Witness: Well, there were quite numerous conversations.
The Court: Ten, twenty, fifty?
The Witness: Twenty or thirty.

By Mr. Pogoda:

Q. Can you tell us, to the best of your recollection, in which conversation the name of the defendant Duke Anfield came up?
A. Well, when Jesse Colson decided to cooperate, his name came right up.

[fols. 1465-1469] Q. Well, when was that? How soon before you approached Duke Anfield and had a conversation with him?

A. Well, Colson began to cooperate in July, July 27, 1959, I think. And how soon—what? What was the next question?

Q. How son after that did you have a conversation with Duke Anfield?

A. That was after the recording, or in or around that period there before his arrest, December 5, 1959.

• • • • • • • •

[fols. 1470-1480] Q. And Colson was cooperating with you in July or August of 1959; is not that true?

A. That's correct.

Q. Now tell us, as a law enforcement officer, what you did from July or August, 1959 until Schoolboy was apprehended in 1961, to locate him. What you did to try and apprehend him.

A. My particular job—my main interest in this investigation was to obtain evidence against Massiah and the seamen and the longshoremen, if possible. As a Customs agent, that is what I am primarily interested in, to stop the smuggling across the borders. To do that itself takes a lot of work. I've got other cases. I have been out of the City.

• • • • • • • •

[fol. 1481] You had no evidence, other than the word of Colson and Torres concerning any of these defendants?

Mr. Starkey: Your Honor, I will object and ask that a time be fixed.

Q. (Continuing) At the time of your conversations with Colson and Torres, all you had was their word, am I right?

A. As the implication of any of these defendants?

Q. Yes.

A. Well, among other things, besides the conversation, I had the roll of tape, which I figured was evidence, piece of cloth, names of Rene, telephone number, Chile, toll slips, calls made by Colson, which matched

up with the telephone number. I had all those little [fols. 1482-1534] pieces of information.

* * * * * * *

[fol. 1535] Further Cross-examination. By Mr. Carluccio:

Q. Agent Murphy do you know a seaman, Castro?
A. The first name?
Q. Jose N. Castro?
A. Yes.
Q. Was he a shipmate with Massiah on the voyage in question?
A. Yes; I believe he was.
Q. Did he state to you under oath that he had cocaine or narcotics aboard that Santa Maria during that voyage?

Mr. Starkey: That who had?
Mr. Carluccio: I am sorry. That Castro had cocaine or narcotics.

Q. (Continuing) Would you like to look at the grand jury minutes to refresh your recollection? I would like a yes or no answer on that (handing).
A. Yes.
Q. Your answer would be yes?

The Court: The answer to the question is yes?

A. What was the question?

(Question read.)

A. I have "yes" here.
Q. Yes?
A. Yes.
[fol. 1536] Q. And would you also say that he had some knowledge with reference to the particular package in question, the one that was found on the ship on May 6, 1958?
A. No. Not as I know the case.
Q. He didn't tell you he had some knowledge about that package?
A. The package was found on the ship.

Q. The package on the ship—did he know anything about the package? Yes or no.

A. As far as I remember, no.

Q. Do you want to read this again?

A. Yes.

Q. Surely (handing). You can read the rest, but——

(Record read.)

Q. (Continuing) Did he know anything about the package?

A. The package itself or the location?

Q. I didn't say the location. I said the package itself.

A. Not to my knowledge. I don't think he did.

Q. How about the location?

A. Yes. He told me about the false bottom and the shifting back aft.

[fol. 1537] Q. He knew something about the location of the package?

A. Yes.

Q. Was Seaman Castro ever arrested by you?

Mr. Starkey: I will object, your Honor.

The Court: What is the purpose of this question?

Mr. Carluccio: Your Honor, here is a person who, according to the testimony of Mr. Murphy, had cocaine aboard the ship, also knew something about where the package of cocaine was aboard the ship, and I suggest that it would probably be normal procedure to arrest this person, because he had some knowledge about the smuggling of cocaine, in view of the fact that he possessed some, through Mr. Murphy's testimony.

The Court: This man does not control who gets arrested and who does not, but in any event, suppose you answer the question.

A. He was never arrested.

The Court: Let us not ask him why. Let us proceed to something else.

Q. The roommates of Mr. Massiah: I think they were Enrico Silva and Rosario Romano: were those the only two or was there another one?

A. I believe that those were the only two.

[fols. 1538-1551] Q. Did you question them about the take?

A. Yes.

. . . . . .

[fols. 1552-1840] Q. In addition to Enrico Silva and Rosario Romano, what other crew members did you question with reference to this package? Castro we already spoke about.

A. I think there was a fellow by the name Fernandez. That is about all. Once the tape was matched up, I thought I had my man.

. . . . . .

[fol. 1841] (2:50 p.m. In the robing room.)

COLLOQUY BETWEEN COURT AND COUNSEL RE AVAILABILITY OF TRANSCRIPT TO JURY

The Court: The jury has sent the following note to the court:

"May the jury see that portion of the transcript or hear that portion of it read that covers Massiah's conversation with Colson's car."

Now, will counsel state their positions with reference to the request of the jury?

Mr. Carluccio: I state for the defendant Massiah that I request that this portion not be read to the jury because it overemphasizes a portion out of perspective [fol. 1842] with the other portions of the testimony. The recollection of the jury is what controls, as your Honor has charged, in addition to which this particular portion, not withstanding the fact that it is derogatory to the defendant Massiah, was vehemently questioned as to its admissibility in evidence.

This was a conversation by a government informer in furtherance of the government by way of what I call entrapment, with a small "e", so by virtue of the testimony it shouldn't be given, and it would put it all out of context.

The Court: The position of the defendant Thorn?

Mr. Archer: Well, I will go along in support of the contention made by the attorney for the defendant Mas-

siah and further state that I don't recall having voiced any opinion with reference to admitting any papers or relevant portions of the minutes with the other attorneys if they did make such arrangement with the U. S. Attorney.

The Court: Now for the defendants Anfield and Aiken.

Mr. Somers: On mature deliberation I join in the application of the other counsel that the jury recall this [fol. 1843] testimony as best it may without requesting or without the granting of any request on the part of the jury to have the stenographer read any particular portions of the testimony because I feel with counsel that that does unduly emphasize those particular references in reference to the whole of the testimony and that it would be unduly prejudicial and its probative value would be far outweighed by such possible prejudice.

The Court: The government's position?

Mr. Starkey: In the first instance, your Honor, on this question of reading to the jury the transcript of the testimony which becomes of importance in their deliberation, in light of the fact that this question was raised before the jury during my summation, at that point all counsel agreed that they should be permitted to hear such testimony in front of the jury, in the first instance, and I think that if they are not permitted to hear it they are entitled to know the reason why on this occasion, namely, that defense counsel have shifted their position and do make an objection of this kind.

In the second instance I think that, not withstanding this change of position and this objection on the part [fol. 1844] of the defense, that the jury is deliberating and is entitled to whatever tools and instruments they might reasonably use in an effort to facilitate their deliberations in their endeavors to reach a verdict, that it is customary practice in the Southern District of New York to permit them to have portions of the testimony concerning which doubts have been raised read back, and that if they have enough need of a clarification of that testimony to make a specific request in writing to the court, that the court, in the wise exercise of its discretion, should permit them the help they need under the circumstances.

I think that the rule or the practice of reading back testimony is no more unreasonable and no more unusual

than that of permitting them any exhibits in the jury room which went into evidence which would facilitate their deliberations insofar as a verdict is concerned, and that the same rule and the same reasoning should be adopted insofar as this testimony is concerned.

The Court: Well, I understand that it is the uniform practice in the Southern District to read parts of the transcript to the jury. However, I am not aware of any case [fol. 1845] which allows the reading over the objection of counsel representing the defendants. It would seem to me that the advisability and desirability of reading back the transcript can be argued both ways: One, the reading could help the jury decide the case. On the other hand, however, it may be that reading only a part of the transcript to the jury and not the whole transcript to the jury might emphasize unduly that part which is read, and in view of the fact that counsel representing all the defendants are opposing the reading of the transcript to the jury, the jury is going to be advised that counsel have not been able to agree on the reading of the transcript, and consequently the request of the jury will have to be denied with the suggestion that they recall the evidence for themselves.

I am not going to say that the defense counsel oppose it; I am simply going to say that counsel cannot agree, and the reason why I am saying that is, as counsel for the government stated, that there did seem to be some measure of agreement, at least as to reading some part of the transcript, and the Court, in its charge to the jury, did indicate that these portions of the transcript would be read to them if requested.

So I believe that it would be necessary, in these cir- [fol. 1846] cumstances, to tell the jury why their request is being denied without saying which side or which counsel are opposing it.

Mr. Somers: Don't you think, your Honor, that justice would be best served if you just said that—if you just asked them to resort to their best recollection from memory rather than even mentioning that there has been opposition by counsel to its introduction?

Mr. Carluccio: The logic of Mr. Somers' remark is that if the testimony obviously would be derogatory to the defendants, especially to Massiah, it could be well in-

ferred that one of the defense counsel would be against it and not government counsel.

Mr. Somers: Specifically since it was offered by the government and obviously these men—some of them who are of average intelligence, at least, can figure out that the government intends to stand by it, and if counsel objects to it the objecting counsel must be the defense. I think it would be best if they were just told that they were to resort to the best recollection that serves them.

Mr. Carluccio: We will go by that ground rule, though, [fol. 1847] that on agreement we would try to agree in the future as each thing comes up——

Mr. Somers: No. I would suggest that the ruling be constant throughout the trial, that their best memory serve them.

Mr. Starkey: Your Honor, in this regard the government would take violent exception to the defense, and specifically defense counsel having the benefit of a exhibition of the kind that occurred before the jury of agreement that testimony be read back, and then a refusal to do so, and lack of an explanation being given as to the reason for it.

Mr. Somers: No, I can't go with that. All the Court has to do is to tell them that it is in the Court's discretion. The Court feels that the best interests of justice would be preserved if their memory prevailed.

Mr. Starkey: Counsel did say in front of the jury that they would have no objection, and now the jury isn't going to have what was agreed they should have at that time.

Mr. Carluccio: I believe it is necessary to at least tell the jury that counsel haven't been able to agree about the reading of the transcript because there did seem to [fol. 1848] be some measure of agreement between counsel as to the reading of the transcript. And in the Court's charge it did say to the jury that the transcript would be made available to them, so I would think that some reason for not reading the transcript now is required.

Mr. Somers: Your Honor might be able to best serve that by mentioning that this is a three weeks trial and if they are going to ask for testimony every few minutes we might have to go through the whole three weeks all over again.

Mr. Archer: I think we ought to leave it up to your Honor to explain it to the jury.

Mr. Somers: If you say that counsel can't agree they must understand by that that this is an offer of government testimony, that the dissenting counsel certainly is not the government, it must be the defense and I think that would just defeat its purpose in telling them that, Judge.

You might just as well say that "I can't let him read this because of objection by defense counsel." It is saying it in a little bit different way, a little bit more euphemistically, perhaps, but I am sure they will grasp the fact that counsel [fol. 1849] who are objecting are the defense counsel. I think in fairness if your Honor just says that you feel that they should resort to their best memory, it will serve their purpose, and nobody will be prejudiced, despite Mr. Starkey's talk about vehement exhibitions.

Mr. Starkey wanted this opportunity for the jury to examine the records, I said it would be okay, and now you say it's best that they resort to their best memory and that way they can't be mad at Starkey or at me, either the government or the defense.

Mr. Starkey: I would object to the jury being misled in that regard. It was the judge's decision.

Mr. Somers: Well, if the judge hadn't brought that point to my attention—I am very grateful for it—I feel that he is absolutely right in that respect, that this taking it out of context does unduly pinpoint certain precise portions of the testimony that unduly prejudice the defendants because they can't read the whole testimony and have the proper perspective with respect to the particular pinpointed testimony that they asked for.

Mr. Starkey: I submit to the Court, your Honor, that, although I don't have cases at hand, that this is a ques- [fol. 1850] tion of the Court's discretion, and that it would be an abuse of discretion to constitute error in this instance, that clearly——

The Court: Just a moment. We have another note from the jury.

> "May the jury see the portion of the transcript and hear that portion of the transcript that covers

the information given to the customs officers by Torres."

Mr. Somers: Apparently they are considering Massiah throughout here at this point.

Mr. Carluccio: Your Honor, I think maybe we should clear up that point about whether there was an agreement to read certain portions. I think Mr. Somers said, something about his man Leon, and maybe Mr. Pogoda might have said something about it.

Mr. Somers: I did, about Leon Aiken.

Mr. Carluccio: I didn't join in it, and if that was the situation I am sure that Mr Somers wouldn't object to that portion if it is only that one portion, but I think on other portions——

The Court: Is the position of all counsel the same with respect to the second request to read the transcript? [fol. 1851] Mr. Carluccio: Yes, your Honor, especially so because with Torres there is a statement to the customs official that was marked for identification and never put in evidence.

Mr. Starkey: I submit, your Honor, that there is no question that a reading of testimony would be error any more than there is question that submission of exhibits upon request to the jury would be error, and that, the objection of defense counsel notwithstanding, the Court should properly give the jury the tools it requests in furtherance of its deliberations.

The Court: Well, I am going to deny the request, so let's get on the bench.

(The following proceedings took place in open court.)

(Jury present.)

Mr. Starkey: Your Honor, with regard to the conversation just had, may I approach the bench with counsel?

The Court: All right, step up.

(The following proceedings took place at the bench.)

Mr. Starkey: Your Honor, I have a suggestion at this point which I think may well meet the objection raised [fol. 1852] by defense counsel insofar as the reading of

the government's evidence concerning these conversations, and that is that—had it occurred at the time the testimony actually was given—cross-examination as well as direct examination concerning these matters be read to the jury and that way defendants will not be deprived of any rights, nor be the victims of any prejudice any more than they were at the time the testimony was actually taken.

Mr. Somers: We object to it, your Honor.

Mr. Archer: It will be like trying over the case.

Mr. Carluccio: And not only cross-examination, but you would also have to bring in the summation.

The Court: All right, same ruling.

(In open court.)

The Court: Ladies and gentlemen, the Court has considered the requests which have been made to read the transcript, and even though the Court did indicate in its charge that if the jury wanted parts of the transcript read, it would have those parts read to the jury, it is the Court's feeling now that to read certain parts of the transcript and not read the entire transcript would be to unduly emphasize [fol. 1853] that part which was read, and consequently the Court feels that the jury should take the time to recall the evidence the best it can from having heard the evidence and come to a conclusion in this matter based on hearing not only the evidence which the jury wants reread now, but all of the evidence in the case.

Now, I am very reluctant always to deny a request of the jury, but I think that you will understand that if we get to reading parts of the transcript, perhaps we ought to read the entire transcript because there may be some parts that are read and consequently the parts not read wouldn't be fresh in the minds of the jurors like the parts that are read to the jury.

So with that explanation the Court is going to ask the jury to retire again and to recall this evidence for itself, and I think you can recall it for yourself, but I think the Court has a definite recollection about this evidence and I am sure that you all have definite recollections about the evidence, and I think that if you can thrash it out along with the other evidence that is in the case and come

to a verdict as to each one of these counts in the indictment [fol. 1854-1864] it would be better to do it that way.

So with that explanation the Court would ask the jury to retire again and reconsider the four counts of this indictment on trial here.

(Whereupon, at 3:12 o'clock p.m. the jury retired to resume its deliberations.)

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[fol. 1865] Mr. Starkey:

Parenthetically, I would also inform the court that it is the government's information that the defendant Aiken was the author of the threats which were referred to in the testimony in this case, and of which the Court has more than ample knowledge at this point.

The Court: What is the basis of that information?

Mr. Starkey: The basis of the information, your Honor, is that it was the opinion of the Witness Colson, the one [fols. 1866-1880] who was successfully intimidated, and the one who was threatened to the point where he categorically refused to testify for the government, that the source of these threats was the defendant Leonard Royal Aiken.

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[fol. 1881] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 156-56

UNITED STATES OF AMERICA,

v.

WINSTON MASSIAH, Defendant.

INDICTMENT—Filed May 28, 1958

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, Winston Massiah, the defendant, unlawfully, wilfully and knowingly did bring on board, had in his possession or control on board a vessel of the United States, while engaged on a foreign voyage, a narcotic drug; to wit, approximately 3 pounds, 8 ounces, and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship stores.

(Title 21, United States Code, Section 184a)

——, ——, Foreman.

Paul W. Williams, United States Attorney for the Southern District of New York.

[fol. 1882] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 159-216

UNITED STATES OF AMERICA,

v.

WINSTON MASSIAH and JESSE COLSON, Defendants.

INDICTMENT—Filed July 20, 1959

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, Winston Massiah and Jesse Colson, defendants, did unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board a vessel of the United States, to wit, the S.S. Santa Maria, while engaged on a foreign voyage, a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship's stores.

(Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2.)

[fol. 1883] Count Two

1. From on or about the 1st day of January 1957, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, Winston Massiah and Jesse Colson, the defendants, and Fadul Rene Harb Huasaff, named as a co-conspirator but not as a defendant, and diverse other persons to the Grand Jury unknown, did unlawfully, wilfully and knowingly combine, confederate, conspire and agree together and with each other to commit certain offenses against the United States, to wit, to violate Sections 173 and 174 of Title 21, United States Code.

2. It was a further part of said conspiracy that Winston Massiah and Jesse Colson, defendants herein, would unlawfully, wilfully, and knowingly import and bring nar-

cotic drugs into the United States, in violation of Sections 173 and 174 of Title 21, United States Code.

3. It was a further part of said conspiracy that Winston Massiah and Jesse Colson, defendants herein, would unlawfully, wilfully and knowingly receive, conceal, possess, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after said narcotic drugs had been imported and brought into the United States contrary to law, and knowing that said narcotic drugs had been imported and brought into the United States contrary to law, in violation of Sections 173 and 174 of Title 21, United States Code.

Overt Acts

In pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, and elsewhere, the following overt acts were committed:

[fol. 1884] Count Three

1. From on or about the 1st day of January 1957, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Winston Massiah and Jesse Colson, the defendants, and Fadul Rene Harb Huasaff, named as a co-conspirator but not as a defendant, and diverse others to the Grand Jury unknown, did unlawfully, wilfully and knowingly combine, confederate, conspire and agree together and with each other to commit certain offenses against the United States, to wit, to violate Section 184a of Title 21, United States Code.

2. It was a part of said conspiracy that Winston Massiah and Jesse Colson, defendants herein, would unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board vessels of the United States, while engaged on foreign voyages, narcotic drugs not constituting a part of the cargo entered in the manifest or part of the stores of said ships, in violation of Section 184a of Title 21, United States Code.

Overt Acts

In pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, and elsewhere, the following overt acts were committed:

1. In or about the month of October 1957, aboard the vessel S. S. Santa Maria, the defendant Jesse Colson had a conversation with a man.

2. In or about the month of December 1957, the defendant Jesse Colson had a conversation with a man in the vicinity of Ninth Avenue and 17th Street, New York, New York.

[fol. 1885] 1. In or about the month of October, 1957 aboard the vessel S. S. Santa Maria, the defendant Jesse Colson had a conversation with a man.

2. In or about the month of December, 1957, the defendant Jesse Colson had a conversation with a man in the vicinity of Ninth Avenue and 17th Street, New York, New York.

3. On or about the Spring of 1958, the defendant Jesse Colson had a conversation with a man in the vicinity of Ninth Avenue and 17th Street, New York, New York.

4. In or about the month of May 1958, aboard the vessel S. S. Santa Maria, the defendant Winston Massiah had a conversation with a man.

5. On or about the 6th day of May 1958, in the Southern District of New York, the defendant Winston Massiah was in possession and control of a certain quantity of adhesive tape on board the vessel S. S. Santa Maria.

6. In or about August 1958, in the Southern District of New York, the defendant Jesse Colson had a conversation with a man in the vicinity of 12th Avenue and 24th Street, New York, New York.

(Title 21, United States Code, Section 174)

[fol. 1886] 3. On or about the Spring of 1958, the defendant Jesse Colson had a conversation with a man in the vicinity of Ninth Avenue and 17th Street, New York, New York.

4. In or about the month of May 1958, aboard the vessel S. S. Santa Maria, the defendant Winston Massiah had a conversation with a man.

5. On or about the 6th day of May 1958, in the Southern District of New York, the defendant Winston Massiah was in possession and control of a quantity of adhesive tape aboard the vessel S. S. Santa Maria.

6. In or about May 1958, in the Southern District of New York, the defendant Jesse Colson had a conversation with a man in the vicinity of 12th Avenue and 24th Street, New York, New York.

(Title 18, United States Code, Section 371)

——— ———, Foreman.

S. Hazard Gillespie, Jr., United States Attorney.

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